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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 84.

JAY BURNS BAKING COMPANY, PETERSEN AND PEGAU BAKING COMPANY, FEDERAL SYSTEM OF BAKERIES OF OMAHA ET AL., PLAINTIFFS IN ERROR,

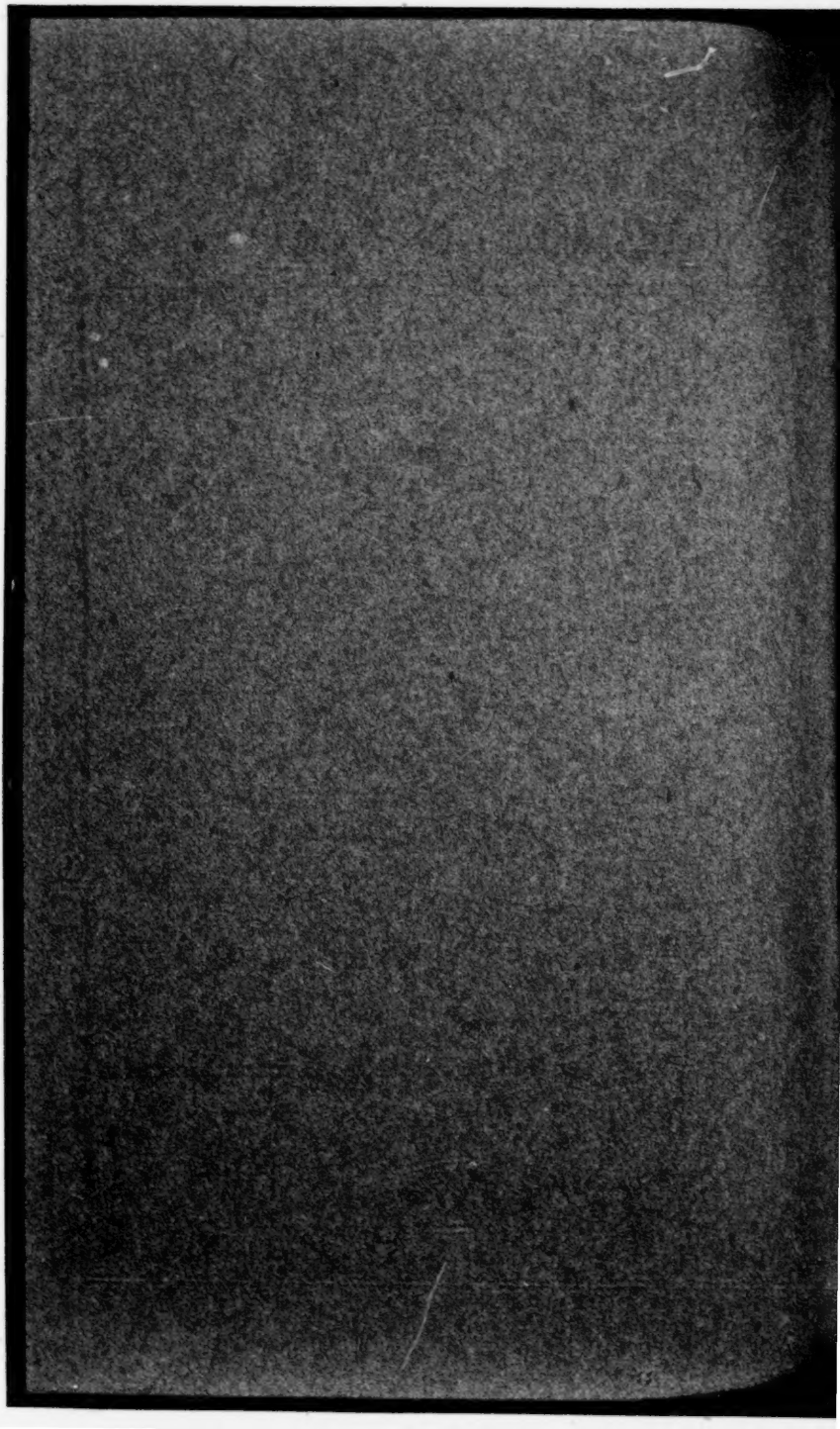
vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED NOVEMBER 1, 1906.

(16,972)



(29,072)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 94.

JAY BURNS BAKING COMPANY, PETERSEN AND PEGAU BAKING COMPANY, FEDERAL SYSTEM OF BAKERIES OF OMAHA ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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[fol. 1] *Pleas*

BEFORE THE

SUPREME COURT OF THE STATE OF NEBRASKA,

AT A TERM THEREOF BEGUN AND HOLDEN AT THE CAPITOL, IN THE CITY OF LINCOLN, IN SAID STATE, ON THE 2D DAY OF JANUARY, 1922.

No. 22452

JAY BURNS BAKING COMPANY et al.

v.

SAMUEL R. MCKELVIE et al.

Present: Hon. Andrew M. Morrissey, Chief Justice; Hon. Charles B. Letton, Judge; Hon. William B. Rose, Judge; Hon. James R. Dean, Judge; Hon. Chester H. Aldrich, Judge; Hon. George A. Day, Judge; Hon. Leonard A. Flansburg, Judge.
Attest: H. C. Lindsay, Clerk.

CAPTION

Be it remembered, That on November 23, 1921, there was filed in the office of the Clerk of said Supreme Court a certain Transcript in the case of Jay Burns Baking Company et al., appellants, v. Samuel R. McKelvie et al., appellees, on appeal from the district court of Lancaster county, containing the proceedings had on the trial of said case in said district court, and the following are true and complete copies of the Bill in Equity for Injunction; the Answer thereto; the Reply to said Answer, and the Decree of the District Court of Lancaster County as the same appear in the said transcript so filed.

[fol. 2] *Pleas*

In the District Court, Third Judicial District of Nebraska, in and for the county of Lancaster, at the September, A. D. 1921, term of said court, begun and held in the city of Lincoln, in said county and State, on the 19- day of September, in the year of our Lord one thousand nine hundred and twenty-one, and on a day therein to wit, on the 10- day of November, A. D. 1921 (that being the 45th judicial day of the September, A. D. 1921, term of said court).

Present: Honorable W. M. Morning, Judge, Presiding; Ira Miller, Sheriff, and J. S. Baer, Clerk.

Be it remembered that at the several times hereinafter set forth were filed in the office of the Clerk of said court papers of which the

following are true and correct copies and proceedings were had and done in the cause below named as follows to-wit:

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Doc. 75, No. 216

Bill in Equity for Injunction—Filed July 12, 1921

JAY BURNS BAKING COMPANY, PETERSEN & PEGAU BAKING COMPANY, Federal System of Bakeries of Omaha, Charles W. Ortman, and James L. Pettys, for Themselves and All Others Interested, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, as Governor of the State of Nebraska, and Leo B. Stuhr, as Secretary of the Department of Agriculture of Nebraska, Defendants.

Bill for Injunction

Plaintiffs and each of them for cause of action against the defendants and each of them allege:

1. That this action is brought for the purpose of having the law known as House Roll No. 24, passed by the Legislature of Nebraska in 1921, and which law is commonly known as the Smith Bread Law, and which fixes a standard weight loaf of bread in Nebraska, which law is hereinafter set forth, declared invalid and unconstitutional by the Court; that there are many hundreds of bakers of bread and dealers in bread throughout the State of Nebraska, whose personal liberty will be wrongfully invaded, and whose property will be taken without due process of law, and who will be denied the equal protection of the law by the enforcement of such Smith Bread Law; [fol. 3] that the questions involved are those of a common and general interest throughout the state, not only to all of the bread bakers and bread dealers in the State of Nebraska, but to all of the bread consumers throughout such State; and that all such so affected by and interested in the law are so numerous as to make it impracticable to bring them all before the Court, and, therefore, plaintiffs bring this action for themselves and each of them, and also for the benefit of all others similarly situated and interested in the Smith Bread Law, in accordance with Section 7200 R. S. 1913;

2. That the plaintiff, Jay Burns Baking Company, is a Nebraska corporation, with a paid up capital stock of $252,000; that its principal business *in* the baking of bread, with its bakery plant located at 20th and Cuming Streets, City of Omaha; that its present business was commenced in 1913, and that its products are distributed throughout Nebraska and the surrounding states wherein it has a constant and growing business; that its annual output of bread is about 10,000,000 pounds, which is of the approximate value of $1,000,000; that its plant and equipment are sufficient for the main

tenance of its present business and for the present methods of baking bread demanded by the public and effecting the distribution thereof throughout the State of Nebraska, and the surrounding states.

3. That the plaintiff, Petersen & Pegau Baking Company, is a Nebraska corporation with a paid up capital stock of $200,000; that its principal business is the baking of twin loaves of bread, with its bakery and plant located at 12th and Jackson Streets, City of Omaha; that its present business was commenced in 1893, and that its products are distributed throughout Nebraska and the surrounding states wherein it has a constant and growing business; that its annual output of bread is about 12,000,000 pounds of the approximate value of $1,300,000; that its plant and equipment are sufficient for the maintenance of its present business and for the present methods of baking the bread demanded by the buying public, and for effecting the distribution of its products throughout the State of Nebraska and the surrounding states.

[fol. 4] 4. That the plaintiff, Federal System of Bakeries of Omaha, is a Nebraska corporation, with a paid up capital stock of $50,000; that its principal business is that of a retail baker, and that it has three separate bakeries in the City of Omaha where it is located; that it commenced business in 1918, and that its bread product is almost wholly sold to consumers over the counter in its stores in single loaf lots; that its annual output of bread is about 1,000,000 pounds of the approximate value of $105,000; that its plant and equipment are sufficient for the maintenance of its present business and present methods of baking the bread demanded by the purchasing public;

5. That the plaintiff, Charles W. Ortman, is a retail bread baker in the City of Omaha, and has been in the business for more than thirty-three years; that his annual output of bread is about 500,000 pounds of the approximate value of $60,000; that the bread baked by him is principally sold to consumers over the counter in single loaf lots; that his present plant and equipment are sufficient to meet the demands of his customers and the buying public both as to size and quality and quantity.

6. That the plaintiff, James L. Pettys, is a retail grocer and a dealer in bread in Omaha, and has been in such business for about twenty years; that he sells bread principally in single loaf lots from day to day to the consuming public over the counter in his store.

7. That the defendant, Samuel R. McKelvie, is the duly elected, qualified and acting Governor of the State of Nebraska, and is charged with the duty of executing and administering the laws of the State, and of supervising and directing the work of the Department of Agriculture, and is aided therein by the Secretary of Agriculture.

8. That the defendant, Leo B. Stuhr, is the duly appointed, qualified and acting Secretary of Agriculture for the State of Nebraska, and is in charge of the Department of Agriculture to aid the Governor of the State in the execution and administration of the laws concerning and affecting such Department, and executed and admin-

istered by it; that one of the functions of the Department of Agriculture is to enforce the provisions of House Roll No. 24, passed by the Legislature of 1921, and commonly designated as the Smith Bread [fol. 5] Law, and hereinafter set forth;

9. That the Legislature of Nebraska at its session held in the year 1921, enacted into law House Roll No. 24 commonly known as the Smith Bread Law and which law was duly approved and signed by the Governor of the State on March 31, 1921; that such law will become effective and will be put in force by the defendants and each of them, on July 29, 1921, pursuant to the duties imposed by law upon such defendants and each of them, unless the said defendants and each of them be restrained and enjoined from so enforcing the provisions of the Smith Bread Law by the order of this Court; that a copy of the said House Roll No. 24, known as the Smith Bread Law is attached hereto and made a part hereof, marked Exhibit A.

10. That under and by virtue of the terms of the said bread law, it is made a crime in the State of Nebraska to make for sale, expose for sale, or sell loaves of bread which shall weigh respectively other than one-half pound, one pound, and one and one-half pounds, or multiples of one pound, allowing a tolerance or variation in weight of not more than two ounces to the pound in excess only of such standard weights.

11. That under such law it will be a criminal act in the State of Nebraska for any one to make for sale, to expose for sale, or to sell loaves of bread in the State within twenty-four hours after their baking if such loaves shall be under or over the following respective weights:

(*a*) A half pound loaf weighing not less than 8 ounces, and not more than nine ounces;

(*b*) A one pound loaf weighing not less than sixteen ounces, and not more than eighteen ounces;

(*c*) A one and one-half pound loaf weighing not less than twenty-four ounces, and not more than twenty-seven ounces.

(*d*) Any multiple of a one pound loaf allowing only an excess variation over such multiple of two ounces to each pound in weight contained in such multiple loaf.

12. That for many years the most popular loaves with the consuming public in the State of Nebraska, and in the surrounding States [fol. 6] have been loaves retailing at 10¢ and 15¢ each respectively; that the weights thereof, and of all other loaves made by the bakers for years have fluctuated in accordance with the market price of the ingredients contained in such loaves; that is, when the prices of ingredients advanced, the weights of the loaves have been correspondingly decreased, and when the price of ingredients was lowered, the weight of the loaves has been correspondingly increased, the quality of the loaf remaining the same all the time; that the minimum weight of each loaf sold to the consuming public is stamped upon the

wrappers of all wrapped bread so that the purchaser may know what weight of bread he is purchasing and paying for.

13. That no dissatisfaction has ever been expressed by the bread buying public in the State of Nebraska with such arrangement and plan, the public demand being almost wholly for a high quality of bread rather than for any given weight or size of loaf, and that the demand for the standard and high quality of bread has been met and maintained by the bakers under the arrangement and plan aforesaid of making the weight and size of the loaf correspond with the fluctuation in prices of the ingredients used in making such bread; and that there has never been and is not now any demand by the bread buying public of the State for a fixed weight of loaf of bread or of any particular or stated size.

14. That there is no standard quality of bread under any existing law, nor will there be under the provisions and terms of the Smith Bread Law, as it is not possible, from the nature of bread, to standardize its quality; that pure bread is composed of few or many ingredients according to the judgment or opinion of the individual baker and the demands of his customers, some of such ingredients being flour, water, salt, yeast, sugar, malt-syrup, shortening, milk, potato flour, and various kinds of corn flours, yeast foods, etc., all of which though pure, vary in their richness or strength with a consequent wide variation in the richness or quality of the bread baked therefrom, though all of such various qualities of bread are pure and wholesome and are in accordance with the requirements of the law.

fol. 7] 15. That the dough from which bread is baked contains from 37% to 45% of moisture, which moisture evaporates in the baking process and also after the bread is baked and for a period up to twenty-four hours, such period depending upon the kind and quality of ingredients, temperature and humidity of the oven and the atmosphere, etc.; that owing to the fermentation which takes place in the dough after it is mixed and before it is inserted in the oven, it is necessary in order to obtain the best results, to place the dough in the oven at a given stage of the fermentation wit'.out regard to the temperature of the oven at such time, which stage of fermentation is variable in time owing to the character and quality of the ingredients used in the dough and the prevailing conditions at the time of the atmosphere, heat, etc.; that it is not possible to maintain a uniform heat in all parts of the ovens and during all the times that the loaves of bread are being inserted in the ovens and being baked therein, and that the evaporation of moisture is more or less affected at all times by the temperature not only of the ovens, but of the atmosphere in the bakery where the bread is kept and by the humidity in the air and by the natural conditions which are entirely beyond the control of the baker;

16. That the oven used in the average bakery for baking bread has a capacity for a large number of loaves at one time, but that there is only one opening into the oven through which to insert the dough and withdraw the baked loaves, the process being termed loading and

unloading; that only from four to six loaves either of dough or bread can be handled at one operation and those first loaded being shoved to the rear of the oven are the last ones unloaded after being baked, such process of loading and unloading requiring from seven to ten minutes of time, so that the loaves in any oven vary as to time in the baking process and hence vary correspondingly in the quantity of moisture evaporated;

17. That because of such variable and uncertain conditions in the mixing of dough and the baking of bread, and in order to obtain a loaf of bread weighing not less than one pound at any time within twenty-four hours after baking, it is necessary to insert in the oven [fol. 8] a sufficient weight of dough, the process of weighing being called "scaling the dough," to meet all of such varying and uncertain conditions, and to allow for the evaporation of moisture which may take place both in the oven during the baking process and after the baking process has been completed; that owing to the constant variation in the time taken for the evaporation of the moisture in both dough and bread, it is necessary to scale such a quantity of dough as will, after making due allowance for the greatest evaporation possible, result in sufficient bread to weigh one pound or the desired weight of bread within twenty-four hours after baking; that if on the one hand the evaporation of moisture be slow owing to conditions, then the weight of the bread during some part of a twenty-four hour period after baking may be more than the maximum allowed for the loaf in the Smith Bread Bill; but if, on the other hand, the evaporation of moisture be great owing to prevailing conditions, then the weight of the bread within a twenty-four hour period after baking may be less than the minimum number of ounces provided in the Smith Bread law:

18. That the weight of the moisture evaporated during the process of baking and afterwards for twenty-four hours after the bread is baked will vary from one-half ounce to three ounces or more in a nineteen ounce unit of dough, and that under the modern process of bread baking, it is absolutely impossible to predetermine the quantity of dough which must be scaled to produce a loaf of bread which will, under any and all varying conditions weigh not more than eighteen ounces and not less than sixteen ounces, being one pound, during the twenty-four — period after being.

19. That although the amount of moisture evaporated and the consequent shrinkage in the various loaves of bread vary widely under different and varying atmospheric conditions, the food value of the baked loaf remains the same, so that loaves of bread of different weights baked from equal weights of dough have equal food value though some loaves may be lighter than others, and therefore, a loaf of bread has the same food value twenty-four hours after [fol. 9] being baked, that it had when it left the oven, though the difference in weight, caused by the evaporation of moisture, may be several ounces to the pound of baked bread, and thereofre, the purchaser of such a loaf obtains equal food value at any stage of the evaporation and though the loaf shall weigh less at one time than it

does at another time on account of the evaporation of moisture which takes place continuously to a greater or lesser degree during a period of twenty-four hours after the baking process.

20. That under the plan and arrangement of graduating the weight of the loaf in accordance with the fluctuation in the market prices of ingredients as now practiced by plaintiff bakers and others, the standard prices of 10¢ and 15¢ per loaf have been maintained practically all the time and have become more or less fixed and stabilized, and the quality of the bread has been preserved and the buying public has at all times shared ratably in the increase or decrease in the market prices of the ingredients without any deterioration in the quality of the bread consumed; that under the Smith Bread Law, should the cost of the loaf increase but a fraction of a cent, the price to the consumer, if the quality should be maintained, will of necessity, be raised a full cent, because the cent is the lowest unit of money in circulation, so that the retailer and baker will make more than a normal profit, and the consuming public will pay more for its bread than it is now paying, and more than it should pay after making due allowance for the usual margins of profit in the baking of bread, which margins ordinarily do not exceed six-tenths of a cent per loaf for the baker, or 2¢ for the retail dealer in bread; and thus the Smith Bread Law, if put into effect, will be detrimental to and against the interests of the consuming public, and will not in any way, shape or manner be beneficial to it.

21. That under the modern baking process one barrel of flour weighing 196 pounds produces approximately three hundred loaves of bread weighing one pound each; so that, because the minimum unit of money is one cent, it will necessarily be impossible to give the bread consuming public the benefit of a reduction in price of less [fol. 10] than $3.00 per barrel of flour, and thus the Smith Bread Law will, to such extent, be against the interests of the consuming public in its operation and effect if upheld.

22. That because the prices for bread have become by usage and custom standardized and stabilized at 10¢ and 15¢ per loaf respectively, according to size, bakers of bread will, under the Smith Bread Law, in order to conform to such standardized and stabilized prices, obviously be obliged to lower the quality of the bread upon an increase in price of the ingredients in order to maintain the usual margin of profit; and again, the Smith Bread Law will, in its operation, be detrimental to and against the interests of the bread consuming public.

23. That a large quantity of bread is shipped into Nebraska from the surrounding states by outside bakers, and that under the Smith Bread Law, the weight of such loaves of bread so shipped into the State of Nebraska, can only be determined by averaging the weight of twenty-five loaves of any one unit at the place where the loaves are offered or exposed for sale by a dealer; whereas the weight of loaves baked in Nebraska is, under the Smith Bread law, determined by averaging the weight of twenty-five loaves of any one unit at the

bakery which shall have baked such loaves; that as a necessary consequence the retail dealer in Nebraska, who buys from an outside baker and exposes for sale only twenty four loaves or less of any one unit, even if such loaves of bread shall be under or over the weight specified in the Smith Bread Law, will be immune from arrest because of the inability of the Law officer to obtain the necessary twenty-five loaves of bread for weighing purposes; whereas the dealer who buys similar quantities and kinds of loaves from a Nebraska baker, is subservient to the law and the penalties therein specified, as the law officer can and will obtain the necessary number of loaves from any source whatever and weigh them at the bakery where they were baked; that in addition to the foregoing lack of equal protection of the law, the baker outside the State of Nebraska, will be able to ship his under weight products into the State of Nebraska and market it in lots of twenty-four loaves or less with impunity, but the [fol. 11] Nebraska baker will be subject to the fine and imprisonment imposed in the Smith Bread Law, if he pursues the same course.

24. That the plaintiffs, Jay Burns Baking Company, and Petersen & Pegau Baking Company, and other wholesale bakers of their class, supply by far the largest quantity of bread to the consuming public in the State of Nebraska, and that in the larger bakeries, such as those operated by said plaintiffs and doing a wholesale business, the process of bread baking is more or less continuous all of the time owing to the pecul-ar conditions of bread baking and to the requirements of the trade, and the consuming public for fresh bread, and owing to such facts and to the exactions of business, the products of such larger bakeries rarely reach the consuming public before twelve or more hours have elapsed after the baking process, and that consequently the evaporation of moisture continues in varying degrees of intensity during all of such period of time, and the loaf becomes constantly and continuously lighter in weight through the evaporating process.

25. That in practically every city, town and village in the State of Nebraska there are retail bakers who bake small batches of bread from two to four times per day according to the demands of their customers in their immediate vicinity, and who sell their bread across the counter direct to local consumers almost immediately after baking; so that such retail bakers' bread is not kept on hand unsold ordinarily for more than three hours after baking, and such bread is thus not subject to so much evaporation as the bread of the larger wholesale bakeries whose bread does not reach the consumer until many hours have elapsed after the baking process; and the bread thus made by the retail bakers will not be subject to inspection under the Smith Bread Law to determine its weight for such a long period of time, as will the bread manufactured by the said plaintiffs and the other large wholesale bakers throughout the State; and thus a discrimination will be brought about under the Smith Bread Law in favor of the retail bakers and against the wholesale bakers, as the retail bakers will not be obliged to scale such a large quantity of dough as will be required to be scaled by the wholesale and larger bakers,

[fol. 12] in order to produce loaves which will meet the conditions and requirements of the Smith Bread Law, because of the shorter period elapsing between the time of baking by the retail baker to the time when his bread reaches the consumer, as the amount of moisture evaporated from the bread made by such retail bakers will not be nearly so great in weight and quantity as the moisture evaporated from the loaves made by the wholesale bakers owing to the much shorter time elapsing between the baking process and the purchase by the consumer from the retail bakers.

26. That the twin or multiple loaf has met with popular approval and favor and is now being made by many of the large bakers throughout the State; that experiments have demonstrated that the one and one-half pound twin loaf, with each unit thereof weighing three-fourths pound, is the most economical, both to make and to consume, and the buying public of Nebraska insists only on having such weight of twin loaf; that in order to make a twin loaf, two units of dough of equal weight are placed together side by side, of end to end in the baking pan and baked as one loaf, and are also sold as one loaf; that units of a one-half pound loaf are so small that they dry out in the baking process and evaporate much more rapidly than do the larger units, and the cost of baking a one pound twin loaf composed of two half pound units, is practically the same as the cost of baking a one and one half pound twin loaf composed of two three-quarter pound units; that it has been found by actual experience that a two pound twin loaf is too large for commercial purposes and that the consuming public will not purchase such a size loaf, but demands the one and one-half pound loaf which has become stabilized and standardized by usage, and which loaf when purchased enables the consumer to break it into two parts and thus preserve one part for later use while the other part is being consumed; that the twin loaf has generally a better flavor than the ordinary loaf, as it is baked with less proof, which means that it requires a shorter period of time for fermentation in the dough; that approximately 80% of the twin loaf bread consumed in the State of Nebraska is in one and one-half pound weights or sizes, with slight variations above or below [fol. 13] according to the fluctuation in the market prices.

27. That the plaintiff, Petersen & Pegau Baking Company, has built up a large and growing business throughout the State of Nebraska in the one and one-half pound twin loaf, which loaf said plaintiff makes and sells as one loaf on the market; that to develop the market and encourage the consumption of such shaped loaf, the said plaintiff has spent large sums of money in advertising and exploitation; that in 1920 the said plaintiff's sales of twin loaves of bread reached in value more than One and one-third millions of dollars, and that about 87½% of the white bread sold by the said plaintiff to retail dealers consists of twin loaves; that the Smith Bread Law if upheld, will destroy the business so built up by said plaintiff at such large expense and the business of the other bakers throughout the State engaged in making twin loaves of bread, and will result in such a loss to such bakers as to virtually confiscate their plant

and business with no resulting benefit to the buying public and with positive detriment to the consumer who will be obliged to purchase the other kinds of bread on the market in lieu of the twin loaf bread now demanded and obtained by him.

28. That the Railroads of the country are among the large purchasers of bread for their dining car and eating house service, and that they have found by experience that the most economical loaves for them to purchase for their trade and which they demand are loaves weighing from twelve to fourteen ounces, and loaves weighing about forty-two ounces; that to secure uniformity in loaves for their trade, the said railroads through the various states provide specially designed baking pans and furnish them to the bakers, the pan for the forty-two ounce loaf being completely enclosed so that it is not possible to add to or subtract from the quantity of dough to be placed in the pan in order to give the desired size and shape of the baked loaf; that some of the plaintiffs have had such railroad bread trade heretofore, but that the plaintiff wholesale bakers and all such bakers throughout the State of Nebraska, will be deprived of such [fol. 14] trade by the enforcement of the Smith Bread Law and with consequent loss of property, and that without any resulting benefit to any one in the State of Nebraska, as the railroads will purchase the required sizes and shapes of loaves of bread from bakers in the adjoining states for consumption in Nebraska, and the Nebraska Bakers, who have heretofore had such railroad trade in bread, will suffer a corresponding loss.

29. That the hundreds of restaurants throughout the State of Nebraska are large purchasers of bread as bread is an article of universal and constant consumption, and such restaurants have found from experience that the most satisfactory loaf for them to purchase and which they demand for their trade, is a loaf very long and thin in shape and weighing from twenty-eight to twenty-nine ounces, because such a loaf is more economical than the ordinary loaf as it has the fewest ends or crusts, and is capable of being cut into the greatest possible number of slices without being awkward to handle, and at as it is not so long nor so fragile as to be easily broken; that some of the plaintiffs and others of their class have had such restaurant bread trade heretofore, but that all such bakers throughout the State of Nebraska will be deprived of such trade by the enforcement of the Smith Bread Law with consequent loss of property, and without any resulting benefit to any one, as the restaurant proprietors will be obliged to incur the expense of a bakery equipment of their own in order to obtain the size desired, else will be obliged to purchase from bakeries maintained outside the State of Nebraska.

30. That the plaintiff wholesale bakers and others engaged in such business throughout Nebraska sell large quantities of bread in the adjoining states of Kansas, Missouri, Iowa, South Dakota, Wyoming, and Colorado, in none of which states does the law require bread to be sold in specific sizes or weights only; that to successfully compete wth the bakers in the surrounding states, said plaintiff bakers and others will be obliged to make the sizes demanded in the

surrounding states and their different communities and will also be required to make, in order to sell in Nebraska, the sizes required [fol. 15] by the Smith Bread Law, all at an increased and useless expense for equipment, etc., and that bread is so constituted as to become stale within a greater or lesser period of time after baking, depending upon the ingredients, temperature, humidity and other conditions, and therefor to be profitable to the baker, bread must be sold when comparatively fresh; that plaintiff wholesale bakers and others in their class have frequent cancellation orders for bread theretofore bought by customers in Nebraska and surrounding states mentioned on account of changes in temperature, storms, bad roads, and such like, causing lessened sales by such customers, and that heretofore that condition of affairs has been met by transference of the cancelled order to another customer in a different place with no resulting loss to the baker by reason of having the bread become stale in his possession; but that under the Smith Bread Law the bakers will be prohibited from transferring any cancelled orders from the surrounding states to customers in the State of Nebraska because of the difference in size of loaves required in the respective states, and will also be prevented from transferring a Nebraska cancelled order to the surrounding states because of the lack of demand for the Nebraska sizes in those other states, owing to the changeable competitive loaf in accordance with market prices of ingredients and to the stabilized and standardized prices heretofore mentioned; and neither can suddenly increased orders from the surrounding states be filled by the Nebraska sizes, nor suddenly increased orders in Nebraska be filled by the sizes of loaves made for and demanded by the surrounding states; that the orders for bread cancelled, or the orders for an increased purchase of quantity of bread do, and often times reach 2,000 loaves in one day, which quantity of bread would thus become stale and of less value under such circumstances, and the restrictions imposed by the Smith Bread Law will thus, if enforced, cause a consequent loss to the bakers with no corresponding benefit to any one.

31. That to comply with the conditions of the Smith Bread Law by the plaintiff bread bakers and the large number of bread bakers throughout the State of Nebraska, will require a change in the [fol. 16] equipment of the bakeries which will entail a large cost an expense to each baker, varying as to capacity and size of the bakery, but running into the thousands of dollars for each of the larger bakeries such as the plaintiffs, Jay Burns Baking Company, and Petersen & Pegau Baking Company, all of which cost and expense will be wasted and of no benefit to either the bakers or to the consuming public, if the Smith Bread Law shall be declared invalid.

32. That the Smith Bread Law is contrary to, and in violation of Section 1 of the 14th Amendment to the Constitution of the United States as follows:

"No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And of Section 3, Article 1, of the Constitution of the State of Nebraska, as follows:

"No person shall be deprived of life, liberty, or property, without due process of law," and of article 1 of the Bill of Rights, in that such Smith Bread Law will, if enforced, deprive the plaintiffs and each of them and others similarly situated, of their liberty and their property without due process of law, and that such Smith Bread Law also denies to the citizens of the State of Nebraska, the equal protection of the law and their constitutional freedom of contract. That such Smith Bread Law was not passed under a proper exercise of the police power of the State of Nebraska, and that such law has not relation whatever to the public welfare or the public health, but is contrary and adverse thereto and such law as passed is arbitrary, unreasonable and oppressive and is an unwarranted interference with the constitutional rights and privileges of the plaintiffs and each of them and of others similarly situated, all done under the guise of police regulation.

33. That the Smith Bread Law violates and is contrary to Section 14, Article 3, of the Constitution of the State of Nebraska, as follows: [fol 17] "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," in that said law contains more than one specific subject, and the subject matter is not clearly expressed in the title, as such title only refers to "establishing a standard weight load of bread," and the penalty to be imposed for violation and nothing else; that there are three distinct subjects treated in the body of the law as follows:

(*a*) In Section 1, it is made the duty of the Department of Agriculture to enforce all provisions.

(*b*) In Section 2 the standard weight is fixed at one-half pound, one pound, and one and one-half pounds, and exact multiples of one pound.

(*c*) In Section 2, the quality of the bread is specified in that it shall be made of pure flour and wholesome ingredients and shall be free from injurious substances.

But no mention whatever is made in the title to the said law of either the duty of the Department of Agriculture to enforce the law or of the quality of bread which shall be made for sale or exposed for sale, or sold in Nebraska.

34. That plaintiff and each of them have no adequate remedy at law in the premises; that the enforcement of the Smith Bread Law will entail a multiplicity of suits at consequent large expense to the plaintiffs and to other litigants; that if the enforcement of said law be not enjoined, plaintiffs and each of them will sustain

immeasurable damage and irreparable injury to their business and property in that they will be unable after July 29, 1921, when the said law will become effective, to dispose of any of their products not conforming to the requirements of the Smith Bread Law, to dealers, as the latter will refuse to accept any products which will subject them to criminal prosecution while the validity of said law is still undetermined, and plaintiffs and each of them will thereby have diverted, and will lose, their regular trade and custom and will have permanently impaired the good will of their business and their trade, built up by long years of development and large expenditures [fol. 18] of money, and that therefore, plaintiffs appeal to a Court of Equity to enjoin the threatened wrongful invasion by the defendants of the rights of liberty and property of the plaintiffs and others similarly situated.

Wherefore plaintiffs and each of them pray—

1. That the Court shall decree that House Roll No. 24, passed by the Legislature of the State of Nebraska in 1921 and known as the Smith Bread Law, is unconstitutional and invalid, and that defendants and each of them, their agents and employes, and all persons claiming to act under their authority, direction or control, or that of either of them, shall be permanently enjoined from in any way enforcing the provisions of the said law.

2. That pending final hearing the Court shall issue its temporary order of injunction restraining and enjoining the defendants and each of them, their agents and employes, and all persons claiming to act under their authority, direction or control, or that of either of them from enforcing the provisions of the said law.

3. That plaintiffs and each of them may have such other and further relief in the premises as shall be just and equitable.

Montgomery, Hall & Young, Attorneys for Plaintiffs.

[fol. 19] STATE OF NEBRASKA,
County of Douglas, ss:

Jay Burns, being first duly sworn according to law, says that he is President of Jay Burns Baking Company, a corporation, and one of the plaintiffs in the foregoing action; that affiant has been engaged in the baking business in Omaha for more than thirteen years last past and that he has been engaged in the bread baking business in Omaha for more than nine years last past, that he is connected with the National Association of Bakers, known as the American Bakers' Association, and has attended all of its meetings in recent years, and has met and conversed with bakers from all parts of the United States, and has kept in close touch with baking conditions and requirements not only in the State of Nebraska, but throughout the United States; that affiant has given particular attention in connection with such National Organization to State legislation, and is familiar with the laws and regulations throughout the United States in the matter of

fixed weights of bread; that affiant has, in connection with his said business in Omaha, thoroughly familiarized himself with the process of dough mixing and bread baking and with the results obtained under various conditions; that affiant has read the foregoing petition, and that the facts therein stated are true, except as to the facts set forth in paragraphs 3, 4, 5, 6 and 27, and that as to such facts affiant believes same to be true.

Jay Burns.

Subscribed in my presence and sworn to before me this 11th day of July 1921. Chris Boyer, Notary Public. (Seal.)

[fol. 20] STATE OF NEBRASKA,
County of Douglas, ss:

Peter F. Petersen, being first duly sworn according to law, says he is President of Petersen & Pegau Baking Company, a corporation, and one of the plaintiffs in the foregoing action; that affiant is a practical baker and has been connected with the baking business for over forty-four years, thirty-two of which years have been spent in the baking business in the United States; that affiant is thoroughly conversant with the modern methods of baking bread in a large way, and with the equipment and plant necessary to conduct a large baking business; and affiant, in connection with his said business in and about Omaha, and the State of Nebraska, and the surrounding States, has familiarized himself with the public demand and requirements for bread; that affiant has read the foregoing petition and that the facts stated therein are true, except the facts set forth in paragraphs 2, 4, 5 and 6, and that as to such facts affiant believes them to be true.

Peter F. Petersen.

Subscribed in my presence and sworn to before me this 11th day of July 1921. J. S. McCallan, Notary Public. (Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

Philip T. Hedin, being first duly sworn according to law, says that he is General Manager for Federal System of Bakeries of Omaha, a corporation, and one of the plaintiffs in the foregoing action; that affiant as such Manager is conversant with the conditions surrounding the manufacture of bread by retail bakers and the sale of bread at retail, and is also conversant with the demands of the consuming public with reference to the standard and stabalized price of 10¢ and 15¢ per loaf respectively, and also with the requirements of the bread consumers, who demand quality and not quantity of bread when buy-
[fol. 21] ing; that affiant has been engaged in the business of bread manufacture for many years and is entirely familiar with the modern process of baking bread; that the matters and things stated in the foregoing petition are within affiant's knowledge and are true, except that affiant is not cognizant of the personal data given in the

petition concerning each of the other plaintiffs, and that affiant does not make oath to the facts concerning such personal data of the other plaintiffs, but does verify all other matters and things set forth in such petition.

Philip T. Hedin.

Subscribed in my presence and sworn to before me this 7th day of July 1921. Effie Cover, Notary Public. (Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

Lawrence Ortman, being first duly sworn, says that he is a son of Charles Ortman and is associated with his father in the baking business in the City of Omaha; that affiant is general manager of his father's baking business and is thoroughly conversant with the methods of baking and equipment required in retail bakeries and with the demands of the public with reference to the character, size and quality of bread; that affiant's father is at the present time in Europe, and that affiant is for that reason making this affidavit; that affiant has read the allegations contained in the foregoing petition in which affiant's father is one of the plaintiffs, and that the facts therein stated are true, except as to the facts stated in paragraphs 2, 3, 4, 6, 27 and 30, and that as to such facts, affiant believes them to be true.

Lawrence Ortmann.

Subscribed in my presence and sworn to before me this 11th day of July 1921.

F. L. Wolff, Notary Public. (Seal.)

[fol. 22] STATE OF NEBRASKA,
County of Douglas, ss:

James L. Petteys, being first duly sworn according to law, says that he is one of the plaintiffs in the foregoing action; that he has been a dealer in bread at retail for more than twenty years and as such dealer has become familiar with the requirements and demands of the public in regard to bread; that he has read the foregoing petition and that the allegations therein contained are true, except as to the allegations contained in paragraphs 2 to 5 inclusive, 15 to 19 inclusive, 21, and 23 to 31 inclusive, and as to such facts affiant believes them to be true.

Jas. L. Petteys.

Subscribed in my presence and sworn to before me this 11th day of July, 1921. Chris Boyer, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 23] In the District Court of Lancaster County, Nebraska

[Title omitted]

ANSWER—Filed Aug. 2, 1921

Come now the defendants in the above entitled cause and for answer to plaintiffs' petition filed therein state:

I

Defendants admit that at all times in said petition stated, Samuel R. McKelvie was and that he now is the duly elected, qualified and acting Governor in and for the State of Nebraska, and is engaged in the performance of his official duties.

II

Defendant- admit that the defendant, Leo B. Stuhr, was at all times in plaintiffs' petition stated and now is the duly appointed, qualified and acting Secretary of Agriculture for the State of Nebraska, and is engaged in the performance of his official duties.

III

Defendants admit that the Legislature of Nebraska at the session held in the year 1921 enacted into law House *Roll* 24, commonly known and designated as the Smith Bread Bill, which bill was duly approved and signed by the Governor of the State of Nebraska, and which law is now in full operative force and effect in the State of Nebraska.

IV

Defendants admit that violations of the said Smith Bread Law [fol. 24] aforesaid may result in criminal prosecution of the person or persons so violating the provisions of said law.

V

Defendants admit that heretofore the plaintiffs and other bakers of the State of Nebraska have stamped upon the wrappers of all wrapped bread, except in cases where they have neglected to comply with the law, the minimum weight of said bread so sold and offered for sale to the consuming public in the State of Nebraska; and admit that said plaintiffs were able to comply with the law requiring the minimum weight of said loaves of bread to be so stamped upon the wrappers thereof.

VI

Defendants further state that plaintiffs have a full and adequate remedy at law.

VII

Defendants further state that it is provided by Article 5, Section 2 of the Constitution of the State of Nebraska, that no legislative act will be held unconstitutional except by the concurrence of five judges, and that the judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute.

Wherefore, the District Court of Lancaster County, Nebraska, is without jurisdiction to pass upon the constitutionality of the Smith Bread Law.

VIII

Further answering plaintiffs' petition, the defendants deny each and every allegation, averment and fact therein stated, not herein expressly admitted to be true.

Wherefore defendants pray that said cause may be as to them and each of them dismissed, and that they and each of them may recover their costs herein expended.

Samuel R. McKelvie, Governor; Leo B. Stuhr, Secretary of Agriculture, Defendants, By Clarence A. Davis, Attorney General; C. L. Dort, Assistant Attorney General, Their Attorneys.

[fol. 25] STATE OF NEBRASKA,
County of Lancaster:

I, Samuel R. McKelvie, being first duly sworn, depose and say that I am the duly elected, qualified and acting Governor in and for the State of Nebraska and that I am one of the defendants in the foregoing entitled cause; that I have read the foregoing answer, know the allegations, averments and facts therein stated, and that the same are true as I verily believe.

Samuel R. McKelvie, Governor of the State of Nebraska.

Subscribed in my presence and sworn to before me this 2nd day of August, 1921. Hazel Nigh, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 26] IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

[Title omitted]

Reply—Filed Sept. 14, 1921

Plaintiffs for reply to the answer of defendants state:

1. That they admit that by Article V, Section II of the Constitution of the State of Nebraska, it is provided that no Legislative Act will be held unconstitutional by the Supreme Court, except by the concurrence of five Judges of such Court, and that the Judges of the Court sitting without division shall hear and determine all cases involving the constitutionality of a Statute.

2. That they deny each and every other allegation contained in said answer.

Wherefore plaintiffs renew the prayer of their petition heretofore filed.

Jay Burns Baking Company et al., Plaintiffs, By Montgomery Hall & Young, Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

Jay Burns, being first duly sworn according to law, says that he is President of Jay Burns Baking Company, one of the plaintiffs in the foregoing action; that he has read the foregoing reply and knows the contents thereof, and that the facts therein stated are true as he verily believes.

Jay Burns

Subscribed in my presence and sworn to before me this 13th
[fol. 27] day of September, 1921. Effie Cover, Notary Public
(Seal.)

[File endorsement omitted.]

75-216

[Title omitted]

JOURNAL ENTRY OF DECREE

This cause having been heretofore submitted to the Court, now comes on for final determination, and the Court being fully advised in the premises, finds generally in favor of the defendants, and against the plaintiffs; finds that the plaintiffs are not entitled to the relief prayed for, and that the temporary injunction heretofore entered herein be dissolved and action dismissed at costs of plaintiffs to all of which plaintiffs each severally except.

It is therefore considered, ordered and adjudged by the Court that the temporary injunction heretofore entered herein be and hereby is dissolved, and that this case be and hereby is dismissed at the costs of plaintiffs, Jay Burns Baking Company, Petersen & Pegau Baking Company, Federal System of Bakeries of Omaha, Charles W. Ortman [fol. 28] and James L. Pettys, for themselves and all others interested, taxed at $—, for which execution is hereby awarded. Supersedeas bond fixed at the sum of $1,000.00, and forty days from rising of court allowed in which to settle bill of exceptions.

[fol. 29] And afterwards, to wit, on January 19, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions containing the evidence adduced in said case on the trial had in the district court of Lancaster county; and on July 17, 1922, there was filed in the office of said Clerk the following Stipulations in re the bill of exceptions to be made a part of the record in this error proceedings to the Supreme Court of the United States.

[fol. 30] IN THE SUPREME COURT OF THE UNITED STATES

8940

[Title omitted]

STIPULATION CONCERNING BILL OF EXCEPTIONS—Filed July 17, 1922

It is stipulated by and between the parties hereto, through their respective counsel that the following constitutes the Bill of Exceptions embodying only so much of the evidence as is necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, all as required by Rule 4 of the Rules of the Supreme Court of the United States.

Matthew A. Hall, Counsel for Plaintiffs in Error. Clarence A. Davis, Attorney General; C. L. Dort, Assistant Attorney General, Counsel for Defendants in Error.

Supreme Court

STATE OF NEBRASKA, *ss:*

ORDER SETTLING BILL OF EXCEPTIONS

The attached bill of exceptions consisting of pages 130 to 179 inclusive is allowed as such and is ordered made a part of the record herein.

A. M. Morrissey, Chief Justice Supreme Court of Nebraska.
July 17, 1922.

[File endorsement omitted.]

[fol. 31] IN THE DISTRICT COURT OF LANCASTER COUNTY, STATE OF NEBRASKA

75. 216

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

[Omitted per stipulation]

[fol. 32] **BILL OF EXCEPTIONS**

1

Evidence in Behalf of Plaintiffs

DR. HARRY SNYDER

Direct examination:

I am chemist for the Russell-Miller Milling Co., Minneapolis, and have been for thirteen years or more. My work for the past thirty-two years has been in connection with bread flour and food nutrition. During that time I carried on experiments to ascertain the digestibility and nutritive value of different kinds of bread for the United States Department of Agriculture. Where I am now we have a well equipped laboratory and experimental bakery, run much the same as a commercial bakery.

I am familiar with the constituents of bread and its method of baking. Flour owes its bread-making characteristics to glutin, which is the body, or substance resulting from the mixture of flour with water, forming a dough. No other cereal than wheat contains such material in quantity as wheat flour. In bread making water is necessary, the amount being governed by the kind of flour used. In the low glutin flour a minimum of water is required, and in a high glutin flour more water is required. Glutin is the material which gives the bread-making value and is included in the term protein. So flours which have the largest amount of glutin make the best bread or that which has the highest food value. Low glutin flours are of the starchy kind and have a much lower food value. The weight of a loaf of bread depends in large degree upon the character of the ingredients used. The more water there is in a dough, the greater the evaporation, and the greater the variation in weight between the dough and the finished product. In making bread from a high glutin flour, the baker must use about 60% of water in mixing the dough. The baker does not know of the moisture content in flour as it varies with quality and conditions in the place where the flour is kept (B. 205).

[fol. 33] Low glutin flour, or low quality flour, does not take the high absorption of water and a poorer quality of bread results than from the high glutin or better grades of flour. The best flour requires more water than the poorer grades of flour (B. 206).

By 60% of water I mean 60 pounds of water to the 100 pounds of flour in the dough. In baking bread there is a number of uncontrollable elements. On account of the gas and moisture in the dough, the baker cannot weigh the wet mass of dough with accuracy to insure a loaf of bread of a given weight; and no two pieces of dough are exactly alike owing to the errors arising in handling it, evaporation of moisture, and gas. Flour making has been practically the same since about 1880 (B. 210).

Other factors entering into the evaporation from a loaf of bread are the size and shape of the loaf, the duration of the baking, and the temperature of the oven. The strong or the better grades of flour used in making the best bread hold a greater proportion of water than the lower grades. Wheat flour is in a class by itself and so bread is unique. It comprises 50% of the family dietary.

It thus necessarily follows and is a fact that the best bread, that is, bread made from the best flour, contains more moisture when it is baked than does bread baked from a poor quality of flour, and hence the best quality of bread will have more moisture evaporated from it than will the poorer quality of bread as the latter has less moisture to start with. The best bread will dry out more and faster than the poorer quality of bread. After a loaf of bread is baked it is only the water which is evaporated which thus makes a change in the weight [fol. 34] of the loaf, but there is no difference in the food value of the loaf. It is the same food value after evaporation as it was before the evaporation. The only difference in weight is the moisture content of the loaf, and a loaf of bread weighing only 15½ ounces is of the same nutritive value as when it weighed 19 ounces.

Bread made from a poor or starchy flour has less protein in it than is contained in good bread made from good flour, and thus in the consumption of the poorer quality of bread, some other food, such as eggs or meat having high protein content must be used to obtain a sufficient amount of protein. In fact a loaf of bread of low protein content would require an egg or an egg and a half to raise it to the level of protein content in the loaf made from good flour or flour of high glutin content, and which has the greater quantity of moisture in it. In other words, the poor quality of bread will not furnish the requisite amount of nutritive material and so must be supplemented with more expensive food, and besides the poorer quality of bread is less appetizing, and the family using the poorer quality of bread thus eats less bread than would otherwise be consumed, and in turn eats more of other and more expensive food materials, and thus the cost of living is increased because of the low consumption of a poor quality of bread. The other and more expensive foods are necessary to obtain the necessary quantity of protein in order to have a well balanced ration. The consumer must get the necessary quantity of protein, and if he does not get it from bread,

he must get it from other and more expensive foods. A good quality of bread supplies more than any other food, the best quality nutrients and at less expense (B. 216-218).

[fol. 35] Wheat varies from year to year in its glutin content owing to soil and climatic conditions, and this fact is recognized by the millers in buying wheat from different parts of the country (B. 219).

The demand today is for the best quality of bread, that is, bread made from high glutin flour, and the public is right, because such bread is more digestible than the poorer quality. Poor bread does not arouse the digestive organs and so is not digested without additional expenditure of energy in the body, and so poor breads are not digested with the full degree of ease, comfort and satisfaction as are breads made from the best flour. In other words, poor bread is a greater tax on the human system in its consumption than is good bread (B. 220).

In the experiments which I made it was found that a loaf of bread weighing 18 ounces when it came from the oven would lose in moisture content about 2 1/5 ounces. That was the average. Many of the loaves exceed that (B. 221-222).

From the experiments made and the results obtained it is not possible for a baker to make bread at all times and under all climatic conditions and have a loaf of bread which will weigh just out of the oven not to exceed 18 ounces and which in the 24 hour period following will not lose more than two ounces. That might be done on certain days, but there are days when it is absolutely impossible to make bread to conform to both the maximum and the minimum weight during the 24 hour period after baking. The two controlling factors are temperature and humidity and these vary from day to day in different parts of the country. On some days the humidity [fol. 36] approaches saturation, which means 80% or 90%, and then on hot, dry days, the nature of bread is such that it will dry out more than two ounces to the pound within 24 hours after baking. The conditions of humidity and temperature change during the day so that the baker starting to make bread and not knowing definitely his oven conditions, who puts in enough dough to have a legal loaf at the end of the 24 hour period may have a loaf coming out of the oven in excess of the maximum weight, because the loaf in baking has not lost as much moisture as was anticipated. There is no nutritive value in what is lost, namely: the moisture.

In the course of a few hours the loaf might soon become a legal loaf not exceeding 18 ounces in weight, but before the close of the 24 hour period, on account of the evaporation of the moisture, the loaf might then become illegal by being under weight, that is, the pound loaf may weigh less than 16 ounces, although the baker used every effort to make the loaf legal. The law under consideration makes a criminal of a baker for deviations in weight which are absolutely beyond the baker's control (B. 225).

What I have said applies to 25 loaves as well as to one loaf, and the average of the 25 would be just about the same as the weight of the one loaf and that might be true of any number of loaves passing through the same conditions of temperature and humidity. The

tendency of the loaves is to become equalized as they give off the moisture, and the surrounding atmosphere takes it up after the loaves leave the oven.

[fol. 37] In the United States Food Law it is provided in the regulations that discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water, shall not be considered, but are allowable tolerations and are not a violation of the law (B. 227-228); that is to say, if a loaf of bread is a legal loaf when it leaves the oven, it makes no difference under the Federal Law, how many ounces it loses in weight after that time, because climatic conditions are beyond the control of the baker (B. 228). In the law, bread as such is not specified, but the law applies to all foodstuffs (B. 229).

The present tendency is to improve the quality of farm products, and if a law is such as to discourage the use of the best article such as wheat, then that article has a more limited market. So a law that would discriminate against the production and use of the best flour would discourage the production of the best wheat, and the farmer would have more encouragement to raise a poorer quality of grain. The baker would come nearer to complying with the law by making bread from poor flour of low absorption, but even with such flour there would come days and times when even bread made from such would not comply with the law. I can see no way by which the baker can comply with the law having both a minimum and a maximum weight by the use of either poor flour or the best flour, though everything will be done on his part naturally to lessen variation in weight in the 24 hour period after baking (B. 230). But I know of no way that would be successful in making a loaf of bread that would at all [fol. 38] times and under all conditions comply with the maximum and minimum weight law (B. 231).

The reason why the bakers will use the poorer qualities of flour is because there is less moisture therein consequently less evaporation from the bread after it is baked. The poorer flours make bread which has a less evaporation of moisture in a given time than better flours. In my experiments, made in July and August, the loaves were weighed as soon as cool enough and were again weighed at the end of the 24 hour period. The experiments were made under normal conditions and as near as possible to the actual conditions of handling bread that exist in the bakery and the store (B. 232). We usually made 25 loaves or so in each batch, making duplicate tests and the average weights were determined by weighing the 25 loaves. We used in the tests the strong gluten, or high absorption flour such as is used in bread making, that being the best quality of flour, and which is always higher in price, of course, than the poorer qualities. The high gluten flour commands a better price, and the price paid depends upon the abundance, or otherwise, of the best quality of wheat. There is a difference at times of $1.00 a barrel between the best wheat flour and the poorer grade or starchy flour, so that the baker of the poorer quality of bread makes a greater profit if the bread

be sold at the same price. The public demand is for the best bread because it is moist and is more satisfying than the poorer bread. As said by Dr. Taylor, chief advisor to Mr. Hoover during the war:

"If a bread does not look like good bread, keep like good bread, or taste like good bread, and in addition does not agree (with the con- [fol. 39] sumer) as does good bread, the sentiment of the people turns against it."

Dr. Taylor is a recognized authority on bread and was a government expert during the war (B. 236).

The trade generally, both millers and bakers, accept such government publications to which I have referred as being authoritative. I have written several books concerning foods and their nutritive value which books are used as text books throughout the country (B.237).

A stiff dough is one used with a low amount of water, and a slack dough is one with much water. A characteristic of good flour is that while the dough is slack when the process of bread-making is started, yet in the process the dough gets stiffer because of the physical and chemical changes taking place (B. 268).

Protein is the most valuable ingredient in bread, and the introduction of starch reduces the quality of protein. Starch is indigestible and if a wheat loaf of bread has 20% of starch in it, then 20% of the value of the flour in its protein content is lost. Chemical changes are taking place not only in the dough but also in the baking process of the bread.

Dr. Harry Snyder

Cross-examination:

I did not do the baking in the experiments, but I was present with my expert bakers. We were not attempting to obtain any specific results, but just to determine the natural loss which would occur when bread was made in the natural and normal way and left exposed in a [fol 40] show case for a period of 24 hours. The bread was not wrapped. We made a straight dough such as is made in a bakery. We did not make the experiments to be used in the trial of any law suit, but to give information on the subject to the National Bakers' Association on the loss in weight of bread during the 24 hours after baking. We were not attempting to comply with the provisions of any special law, but were simply making bread as it would be made in the ordinary course of events without any effort going to either extreme. We were not seeking to determine whether we could bake merchantable bread within the tolerance of 2 ounces to the pound, but we obtained the data which answers that question. The dough was so scaled as to bake a loaf weighing around 18 ounces when first weighed, being about 20 ounces of dough (B. 240). What I was trying to determine in the experiments was the shrinkage on bread during the 24 hour period after baking. The results were not used in any law suit. It was purely a scientific investigation (B. 242). I have not testified in any law suit about this matter heretofore. When I made the tests

I did not have in mind whether or not I could comply with any law as to maximum and minimum weights. I would not attempt to say whether or not I could comply within the provisions of the maximum and minimum weight law. Whenever there is an increase in the amount of gluten, there is a proportionate decrease in the amount of starch, and variations in other ingredients would have something to do with the absorption of moisture. Many bakers take into consideration the gluten and starch contents in the flour and find that flours of certain types give them the bread they want (B. 244). It is the duty of a chemist to determine the elements in the flour. Usually a baker [fol. 41] gets a uniform flour from a certain mill, and the same grade of flour from another mill might be appreciably different. Bakers as a rule do not make tests of the gluten in flour, but get their knowledge of the flour almost exclusively in the way that the flour works in the process of breadmaking and in the quality of bread it produces. Absorption of water is a great factor (B. 246).

Bread is quite variable in its composition depending upon the quality of flour and on the method of baking. In our tests we used simply the ordinary straight dough process of manufacture. If the process of bread-making is varied too much, then the right quality of bread is not produced. If too much dough is scaled, or the oven is a little slow, there would be an excess weight loaf which would be illegal at the start of the 24 hour period (B. 247). The heat of the oven cannot be regulated to a point where the bread can be turned out with such uniformity in its moisture content as to get away from the factor of over weight bread when fresh. But if you should get away from that factor, then you get caught on the other end by having a light weight loaf during the 24 hour period after baking (B. 247-8). Our bread was baked at between 450 and 500 degrees Fahrenheit. The dough had a 60 per cent absorption of moisture in the flour, the bakings being around 40 minutes. We cannot tell how much moisture is lost in the baking process, except approximately. We were not trying to produce a loaf which would weigh not less than 16 ounces, nor exceed 18 ounces, as that would not have been an experiment, as experiments are made under conditions that are known and are applied to the specific question under investigation. Our experiment was undertaken to determine what the loss in weight [fol. 42] would be of bread as ordinarily made with high quality of flour without excess moisture in the dough and as a baker would bake bread in the ordinary commercial practice (B. 249). We made no attempt to get any particular result. If we had changed the consistency of the dough we could not have obtained the quality of bread desired. A scientist doesn't start out with a fixed idea that he is going to prove something. I have never tried to make a bread which would come within the minimum of 16 ounces to the pound and not exceed a maximum of 18 ounces to the pound, but I do not think it would be good bread. I do not say it is impossible, but I think you would not get a product that you would really call bread. If you should get the absorption in the flour and the dough, you would have a very dry and an inferior loaf. Water is necessary in bread-making and at least 55 per cent of water must be used even

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with the poorest dough, so that under certain climatic conditions breads made from pure flours will not pass the maximum and minimum test (B. 251). The humidity and the temperature vary much, and affect the dough mixture before it goes into the oven. They are uncontrollable conditions (B. 252). The mechanical losses in the handling of the dough are quite appreciable. Dough scaled at 20 ounces for each loaf might produce loaves varying in weight quite appreciably. Under the best conditions there is a 3% loss in the dough (B. 254). Bread is still moist when it leaves the oven.

I have heard of a product called Badex which it is claimed will keep the moisture in the bread, but I cannot see how any material can do that. Badex is of a starchy nature and starchy content in the bread makes the bread of lower food value (B. 255).

[fol. 43] Flour with much starch requires less water for the making of the loaf of bread, as starchy flours require less moisture as they have not the quality of gluten which calls for additional moisture in making the best bread, and bread made from starchy flours has a less evaporation during a given time. In baking, the heat must penetrate the mass of dough and bring about the chemical and physical changes which are necessary to finish the bread-baking process.

When a loaf of bread becomes dryer than the surrounding air it will absorb moisture. The crust on a loaf of bread is a factor in controlling or retarding evaporation (B. 261). Waxed paper will, I presume, retard evaporation, but many breads are not susceptible of wrapping. There is an uncontrollable shrinkage in the 18 ounce loaf of bread of 12.1% in the 24 hour period after baking. In the dough process there is 6% of uncontrollable shrinkage. There would be a 6% uncontrollable error from the 18 ounce loaf (B. 262-3). I do not think it would be any easier to comply with the law with rye and graham flours. Evaporation takes place more readily in the coarser material, but the process of bread-making is the same. Chiefly water is lost in the drying of bread. There are gases which are negligible in the individual loaf (B. 264). There are some 7,000 mills making flour in the United States and a general statement covering these flours cannot be made as each flour must stand on its own merits (B. 266).

When bread comes from the oven there is 35% or 40% of moisture left in it, depending upon the method of baking and other factors. I [fol. 44] haven't made a test for the express purpose of determining whether or not I can bake a loaf of bread to weigh not less than 16, nor more than 18 ounces within the 24 hour period, but the tests which I have made cover that point thoroughly without starting with that point in view (B. 270).

There is as much gluten in the lower grade, or poor flours, but it does not have the good bread-making qualities. The gluten in the poor flour does not produce as light, porous and satisfactory a loaf as the higher grade flour. The gluten in the poorer flour while ample in amount, is deficient in its good bread-making qualities (B. 271). The poor flour is sold cheaper than the high grade or patent flour. The gluten in the poor flour does not produce the expansion,

quality, taste, and all of those factors which go with good bread, though there may be the same proportion of gluten in the poor, or clear flour as in the patent or high grade flour (B. 271). The poor flours are so called because of their poor bread-making qualities, that is to say, they cannot be made up into an appetizing food product as compared with bread made from the good flours. I do not think bread can be made from a 40% absorption dough, as there would not be enough water to make a dough (B. 272). A baker, under the Smith Bread Law, might go along for twenty or twenty-five days and be all right, then there would be five or ten days when the bread would not comply with the law. The two ounce to the pound tolerance is not a sufficient variation to cover what we know will take place under extreme conditions (B. 273). A loaf of bread weighing 18 ounces out of the oven depends for its evaporation upon the humidity and temperature in the room where it is kept for the 24 [fol. 45] hours thereafter, and if the humidity and temperature could be controlled, that would tend to lessen the loss of moisture in the bread (B. 274). In the maximum and minimum weight loaf law, if the baker attempts to avoid one end he is caught on the other end, and while he might be all right on one 25 loaf batch, he might be caught on the next batch. The law of averages will show that the second batch might not have the same combination and that would throw it out. Loaves cannot be obtained of the same weight. The dough itself as it goes into the oven, varies in weight even with the greatest care the baker can bestow (B. 277). There are conditions where bread will shrink the most in the first twelve hours and then there are other conditions where the shrinkage would be greatest in the last twelve hours, because of the constant change in temperature. If the temperature could be maintained at the same degree for the 24 hours then the shrinkage would just be the normal drying for that temperature and that humidity. A baker can control the humidity and the temperature of his dough room and of his baking room, that is, in the big plants, but when the bread leaves the oven it is no longer under control (B. 279). The inequality of the law arises in the fact that there is not enough leeway between the weight when baked and the weight 24 hours thereafter, because of the uncontrollable factors in the drying process (B. 281-282).

[fol. 46] Tests conducted under my supervision were made by one of our expert bakers "with the observation as to the conditions which he as a bread maker should determine would give the best quality of bread." We were not attempting to obtain specific results "other than to determine the natural loss which would occur when bread was made in the natural and normal way and left exposed in a show case for a period of 24 hours." The bread was not wrapped (B-239). At the time I made the tests I did not have in mind whether or not we could comply with any law as to fixing the maximum and minimum weights. That was not the object. The object was to get the data of the shrinkage. I wouldn't attempt to say whether or not we could come within the provisions of such a law (B-243). My tests were simply "an experiment that was undertaken to determine what the loss in weight would be of bread as ordinarily and usually made, as

made with high quality of flour without excess moisture in doughing and as a baker would make in the ordinary commercial practice. I wasn't trying to secure any particular result (B-249). "I think you can make something but you can't call it good bread. You can make a product which might suggest bread, but it would not be real bread." I have never tried to make such a product as to come within the minimum of 16 ounces and the maximum of 18 ounces (B-250). Wax paper retards evaporation (B-262). I never made a test for the express purpose of determining whether or not you can bake a loaf of bread to weigh not less than 16, nor greater than 18 ounces within the 24 hour period. I haven't started that with a view of making a specific test for that point, but the tests which I have made cover that point thoroughly without starting with that point in view (B-267). I understand the law to require the bread not to at any time exceed 18 ounces and at no time during 24 hours to weigh less than 16 ounces—a maximum and a minimum on an average of 25 loaves, but do not understand that some loaves can be down as low as 14 ounces and some up to 19 ounces, because "while you might have to take into consideration a number of loaves,—but getting the average wouldn't cover the spread. 25 loaves, if you weighed them up [fol. 47] would behave just like one loaf would behave, when you started if the one loaf was an ounce or more heavier when you started, it would be that much proportionately lower, and while it would pass the law on the low end, it would violate the law on the high end" B 274-275). If 12 of the loaves weighed 15 ounces at the end of the 24 hours, and 12 of them 17 ounces, and one exactly one pound, they would come within the law "but the baker could not make loaves in that way, because assuming as he began to make the loaves of that varying and lack of uniformity in the weight the 25 loaves, he would have from 14 to 19 ounces, that is 5 ounces variation and he would have no control of his work, he couldn't tell where he was landing to make bread, even now he wants to divide his dough and wants to make those individual loaves just as near uniform as he can" (B 279). Assuming you could have the exact weight of the dough when put into the oven—that each loaf weighed exactly the same I could expect one-half ounce variation between loaves when taken out of the oven. I found that in my experimental work, but whether larger differences than that might occur, I am not familiar with, but I think that might occur in practice where the bread is handled in quantities. You might get a little piece of dough that would stick to one of the loaves and go to the next, and while the two might average, there would be a difference between them (B 277-278).

[fol. 48] JAY BURNS

Direct examination:

Flour, which is the principal ingredient used in making bread, contains starch and in the baking process the starch cells must be ruptured because unruptured cells are indigestible (B. 135-6).

When the dough is put in the oven from 85 to 90 per cent of the starch cells are unruptured, but become ruptured in the oven by the heat and the moisture, and as they rupture they drink up great quantities of water in the dough so that the flour, and consequently, the dough, must have the maximum of water to rupture the maximum of starch cells (B. 136); and if starch cells in bread are not ruptured, then to that extent is the bread indigestible, for the starch cells pass through the body unruptured or they ferment in the intestines and cause trouble. Starch cells cannot be assimilated unless they are ruptured (B. 137-8). Heat alone will not rupture starch cells, but only in conjunction with moisture, and the more water in the dough, the better the bread. The modern machine dough mixer is so constructed as to incorporate as much water as the dough will hold and thus the maximum amount of starch cells are ruptured in the baking process and so the best bread product results (B. 139). The loaf containing the most moisture has the least unruptured starch cells and is consequently the most nutritious (B. 140).

The public demand is for the best sanitary conditions and hence the greatest quantity of bread consumed is baked from machine mixed dough which machines are very expensive; and too much water in the dough makes it spread and adhere to the machines and gum them so that the dough can only be of a certain consistency, that is, can only contain a certain percentage of water. There is no way known to the baking trade to overcome this condition. The dough must be thick enough to hold its shape and so be scaled and inserted in the oven (B. 140). Both flour and dough are made to [fol. 49] carry the maximum of water so as to get the best bread both as to digestibility and palatability. The greater the quantity of water in the dough the greater the quantity in the baked loaf, and the greater the evaporation of moisture from the loaf during a twenty-four hour period after baking.

Under the Smith Bread Law, a greater quantity of dough with high moisture content must be put in the oven to get a given weight loaf than is required of dough with low moisture content, because the better loaf will contain more moisture and will evaporate more and faster than will the poorer quality loaf made from dough with a low moisture content, and there will be much greater chance for an illegal loaf of good bread than there will be for an illegal loaf of poor quality bread, as the latter will not evaporate as much moisture in a 24-hour period after baking as will the former. The better the quality of the bread, the greater is the shrinkage, or the evaporation of moisture during 24 hours after baking (B. 142). So that the Smith Bread Law will, of necessity, force the bakers to use a poorer grade of flour having less moisture content and poorer quality gluten, in order to produce a loaf of bread having a minimum evaporation of moisture after baking and for 24 hours; and the quality of the bread will thus deteriorate, as many starch cells will be unruptured and these are detrimental to the stomach (B. 143).

While the machines for mixing dough are very expensive, they produce the best quality of bread, which bread, though lighter in weight according to the tables in evidence, sells for more money than the poorer quality of bread which is heavier (B. 145).

[fol. 50] The three wholesale bakers in Omaha make approx
mately 75% of the bread consumed and they make smaller loave
but get higher prices for their product than do the smaller bake
of the other 25% of the bread consumed. The latter loaves, hov
ever, give the dealer the greatest profit as they do not cost the deal
as much as the former (B. 146). The value of the loaf is dete
mined almost entirely by the character of the gluten in the flour an
the development of the dough in the process of manufacture (B
148).

There is no other article of food in the same class with bread, bu
crackers, various breakfast foods, cereals, macaroni, spaghetti, an
other products of wheat and grains are used in place of bread. Non
of these are required by law to be sold at a fixed weight. They ar
all practically sold in packages marked with their minimum weigh
All other foods are marked with their minimum weight, but not thei
maximum weight (B. 152).

I recall distinctly that on Saturday, July 23, it rained from 10:0
to 12:00 o'clock A. M., and thereafter the air was very humid (fron
55 to 72 per cent of moisture in Lincoln, which is very high), an
the Government Weather Bureau report which is here, shows such
conditions: In such an atmosphere as prevailed last Saturday, Jul
23, the evaporation in bread would be very slight—on a hot, dr
day the evaporation would be from two to five times as great.

Cross-examination:

The percentage of evaporation in the oven does not depend solely
[fol. 51] upon the per cent of water in the dough. The amount of
water hasn't anything to do with the time of baking, and the more
water in the loaf, the shorter time it will take it to bake, because it
is better developed and the heat will penetrate more rapidly (B. 155).
About 85% of bread consumed is sold in single loaf lots (B. 157).

Redirect examination:

Loaves vary in weight and cannot be baked to weigh the same.
Consumers do not buy in quantity because they want it fresh and can
get it every day (B. 161). Many shipments of bread are made in
less than 25 loaves of one unit, that is, of the same weight or size.
That is true generally of the bakers. A great deal of bread is
shipped into Nebraska from the surrounding states, and it is cus-
tomary for a bread dealer to handle two sizes of bread and get fre-
quent shipments containing less than 25 loaves of one size, and this
is because the dealer wants to sell, and the public wants to buy, only
fresh bread.

Recross-examination:

Our average shipments per day are 40 loaves containing one or
more sizes (B. 37).

Redirect examination:

There is no way to moisten the cooling, or dough room, except by installing a humidifying system. Out of 30,000 bakeries in the United States, there are about 50 plants with humidified dough rooms equipped with machines to help control the humidity. The machines are expensive to buy and the rooms for them are expensive to build and maintain. They are used nowhere except in the dough [fol. 52] room where fermentation takes place, as humidity is an important factor in fermentation (B. 90-91). There are two humidifiers in Nebraska and approximately 500 bakeries. It is not practical to have a controlled cooling room after the bread is baked, as it is taken in wagons for distributon and is kept for sale in stores. To control the evaporation the bread would have to be kept in a humidified room for 24 hours after baking, and that would be neither practicable nor profitable (B. 91). For years the bakeries have been trying to find a means of handling dough through the machines so as to retain the maximum quantity of water necessary to develop all food values of the flour, but up to date a perfect system has not been devised (B. 92). The greater the moisture in the loaf when baked, the greater will be the percentage of evaporation after baking. The reason why water is desired in the baking of a loaf of bread is that the water permits the development of a larger percentage of the food elements in the flour, and if there has been sufficient moisture in the dough and in the loaf to properly develop the food elements, then the evaporation from the loaf after it is baked does not affect its food value at all (B. 93).

That is the reason why the difference in weight in the loaves made from the same unit of dough does not create any difference whatever in the food value of the loaves, as all the loaves of one unit of dough are of the same food value irrespective of the moisture evaporated after baking. A difference in moisture content in the dough makes a difference in the resulting bread, as the bread baked from the dough containing the highest moisture content will have a greater food [fol. 53] value than the loaf baked from dough containing a lower moisture content, and the better loaf will evaporate more rapidly than the poorer one, though it does not lose its food value (B. 94). Bread made from graham flour and whole wheat flour will dry out more quickly than loaves made of the patent flour, hence in the 24 hour period after baking the graham loaves and whole wheat loaves will evaporate more and faster than will the patent flour loaves (B. 95.)

At the beginning of the war, the U. S. Government Food Administration required standard weights of bread of ¾ pound, one pound, 1½ pounds, and multiples of one pound, and all made from one grade of flour, and the formula from which bread was made was also prescribed, so that every baker in the United States was compelled to use the same kind of flour and to make bread from the same formula, and so there was present all of the elements of control necessary in the operation of a standard weight regulation. Such regulations by the U. S. Government were abrogated shortly after the armistice; and later, owing to the Government wheat guarantee to

the farmers, the head of the U. S. Grain Corporation, Julius Barn made an investigation with reference to bread and as a result t bakers were required to reflect a fluctuation in the price of flour a ingredients by making a variation in the weight of the loaf of t bread, rather than by changing the selling price of the loaf, a that has been the practice of the bakers throughout the country to this time, and was the practice prior thereto (B. 98). This pra tice cannot be continued under the Smith Bread Law. At t present time any one flour mill might make 40 or 50 different grad of flour, and it is not possible to say how many grades or qualities [fol. 54] flour there are now made, from which bread is or may baked (B. 99).

Recross-examination:

On a decrease in the price of the ingredients the size of the lo is increased so as to leave the selling price the same (B. 100).

Redirect examination:

Doughs mixed by modern machinery develop the gluten conte of the flour to a higher degree than it is possible to develop it b hand mixing. In addition to the 13 elements of uncertaint enumerated by Mr. Pirrie, there is the human element with which w have to contend in a bakery and which is very uncertain. There no scheme whereby absolute accuracy can be obtained from em ployes, hence this is as great an uncontrollable factor as any of th others mentioned. An employe might easily over-scale, or unde scale dough, and thus produce batches of bread absolutely in violatio of any standard weight law (B. 432-3).

The experiments by Mr. Jarnagen were made under my supe vision. Eighty-one experiments were made in September, 192 which was a normal month as to humidity and temperature; warme than January and cooler than July, but probably a fair averag Temperature varies very greatly in Nebraska throughout the ye (B. 434). We baked 1,224 loaves in making the experiments. Th dough was scaled so as to produce as nearly as possible a pound loa which would weigh 18 ounces when baked under normal condition 36 tests being made with four loaves each, 45 tests of 24 loaves each [fol. 55] and 54 tests with one-pound loaves, and 27 tests of half pound loaves (B. 435). Thirty-three tests with one-pound loave showed a loss of moisture in the 24 hour period after baking o more than 2 ounces, and 9 tests showed a loss of just 2 ounces, and 1 tests showed a loss of less than 2 ounces. In the half pound loave 22 tests showed more than one ounce loss of moisture in the 24 hou period, and one showed just 1 ounce loss, and 4 showed a loss of les than 1 ounce. The maximum shrinkage on the one pound loaves i the 24 hour period was 2¾ ounces, and the minimum loss one ounce In the half pound loaves the maximum loss was 1¾ ounces, and th minimum loss ½ ounce (B. 436). The tests were all made unde normal conditions and no special affort was made to create humidit or temperature conditions. The result of the experiments woul

have been the same if a greater number of loaves had been baked in each batch (B.439). Under the Smith Bread Law, owing to the impossibility of controlling the factors entering into bread, loaves will at times necessarily be illegal and we and our employes will be subject to arrest, and that in turn will affect our business and cause us immense damage. We would have the same result as we had once before, when an attempt was made to enforce a law which later the court declared invalid (B. 440). Every baker will suffer under the Smith Bread Law because of the impossibility of complying with it. About 100,000 barrels of flour per month is used in Nebraska for making bread, and under the Smith Bread Law a reduction of $1.00 per barrel would not give any benefit to the bread consumer as that would represent only one-third of a cent a loaf and there are no units less than one cent, and the same is true [fol. 56] on the reduction in price of $2.00 a barrel. There must be a reduction of $3.00 per barrel before the price of the bread can be reduced one cent so that until there is a reduction of $3.00 per barrel of flour, the bakers will make an extra profit under the Smith Bread Law which cannot be passed on to the consuming public (B. 442). On an increase in the price of flour of $1.00 a barrel, the baker, to save himself from loss, would have to increase the price of a loaf one cent, there being no smaller units of price, although the increase in the cost would only be one-third of a cent. And thus the bakers would make an abnormal profit at the expense of the consuming public (B. 443). On an increase in the price of the ingredients entering into a loaf of bread, the price of the loaf must be increased, or the quality of the bread must be reduced correspondingly, and if the latter course is pursued, then the bread consuming public is not getting the food value which it ought to get (B. 444). Starch is used to reduce the cost of bread because pure starch only costs about one-half that of wheat flour, but with 20% of starch in the loaf the consuming public would scarcely know the difference, although 20% of starch in flour would give the baker a very much larger profit (B. 446).

Another uncertain element is the non-continuous use of ovens. During the baking process the heat is drawn off very rapidly into the loaves of bread, but when the baking ceases and the oven is shut up the temperature will be materially increased and thus the first batch of bread inserted thereafter will be baked more rapidly and in a shorter time, and less moisture will be evaporated in the baking pro- [fol. 57] cess, and so the loaves would contain more moisture when baked, and thus be subject to greater evaporation during the 24 hour period after baking (B. 447). Railroad companies and restaurants require special sizes of loaves and specially shaped loaves which we could not make under the Smith Bread Law, and as the restaurants and railroads will not take other shapes and sizes, Nebraska bakers will lose all of such railroad and restaurant trade because the railroads and restaurants will buy from bakers in the surrounding states. That trade is quite expensive and is valuable (B. 448).

The retail baker sells only to the patrons who came to his store, while the wholesale baker distributes his bread to the dealers. Compliance with the Smith Bread Law will eliminate our trade in outside states as we will not be able to compete with the bakers in those states making different sized loaves. It is not practicable to make loaves under the Smith Bread Law, and also make other sized loaves for sale in the surrounding states, and the Jay Burns Baking Company would, under the Smith Bread Law, have a loss of 20% of its business which is done in surrounding territory (B. 450).

The ¾ pound loaf provided for by the U. S. Food Administration regulations was in response to a demand for a smaller loaf than the one pound loaf (B. 451). It would be impossible as a practical proposition to humidify an entire baking plant (B. 452). The rooms where the bread is cooled are large and provided with ventilation, and the bread is taken out in frequent intervals to be loaded into delivery wagons, and is brought in at frequent intervals from the baking room. It would be practically impossible to keep any such room [fol. 58] from the external air, and it would be a prohibitive expense to attempt to control the humidity and the temperature in a room so open to the general atmosphere, and besides that, it is absolutely necessary to have circulation, as otherwise the bread would suffer, because a constant circulation of air carries off the gases which are given off by the bread in the cooling process. Both gas and moisture are given off from bread after it is baked (B. 453).

Bread in the larger bakeries is kept in the plant from 3 to 18 hours after baking. The average would be perhaps more than 12 hours. Deliveries with 3 or 4 hours are made in response to emergency calls from the trade and are not regular marketing. It is not possible in a large bakery to market all of the bread baked within a few hours after baking, whereas the retail bakers making small batches of 100 or 200 loaves two or three times a day sell their bread over the counter to patrons who call therefor. The large bakeries have no such trade (B. 454). The large or wholesale bakeries, of necessity, are obliged to keep their bread on hand for a much longer period than does the retail baker.

We have invested approximately $3,500 in paper wrappers and in the campaign to market a twin loaf of bread, but that will be all lost if the Smith Bread Law is enforced because we will not be able to market the twin loaf on account of the sizes mentioned. There is great demand for a twin loaf, because on account of its special treatment it has a distinctive flavor which is not possible with the plain loaf. The labor cost of making the twin loaf is greater than that of the individual loaf and the cost on a pound twin loaf is as much as [fol. 59] on a 1½ pound twin loaf. Under the Smith Bread Law we would be prohibited from making the 1½ pound twin loaf, and the one pound twin loaf and the 2 pound twin loaf permitted, are on account of the size of the units, not marketable loaves. The Smith Bread Law does not permit a ¾ pound unit loaf (B. 457). The twin loaf is sold as one loaf, but under the Smith Bread Law it must be considered two loaves, and as no ¾ pound unit is provided for, then the popular twin loaf of 1½ pounds consisting of two units of ¾

pound each, cannot be made nor marketed. There is no demand for a pound twin loaf, which would have two units of one-half pound each (B. 458). The twin loaf is convenient and economical (B. 459). If the bakers were able to make a bread which would for the 24 hour period be within the limits of the Smith Bread Law, then from my knowledge of such a product, I know it would not be salable (B. 459). The bakers could not possibly make an article to conform to the requirements of the Smith Bread Law which will have the consistency and appearance and quality of the bread which is now being made and which is now demanded by the public, and I have made a special and exhaustive study of bread for the last ten years (B. 462). I am on the executive committee of the National Bakers Association which is trying constantly to improve the conditions in bakeries and the quality of the bread baked (B. 463).

I know of no method whereby bakers can produce the bread which is made for the market today, and know beforehand that 25 loaves of any one size would always, within a 24 hour period, average not less than 16 ounces, nor more than 18 ounces to the pound. I would say [fol. 60] from my experience that it is an utter impossibility, and if it were possible to change the character of the bread and comply with the law, then there would be an unmarketable product (B. 466). The money loss to my company under the Smith Bread Law will be very substantial (B. 467) as the wholesale bakers, from the nature of their business, must have bread on hand much longer than will the retail bakers.

Recross-examination:

The difficulty in regard to splitting a cent would occur when the dealer sells the bread to the buying public. Many families use more than one loaf in a day (B. 477). The baker is injured by any plan that increases the cost to the ultimate consumer disproportionately to the cost to the baker (B. 478). I have not had any experiments made with a view to producing a product which would comply with the weights in the Smith Bread Law. Bread when baked contains from 35 to 40 per cent of moisture, and the solid materials in a loaf of bread would not change during the 24 hour period after baking (B. 484). The greatest evaporation in bread takes place with a low humidity and a high temperature. The Government sheets introduced in evidence, showing the range in humidity and temperature, show a greater range of both than existed at the time our experiments were made (B. 499).

[fol. 61] It is possible that with a twin loaf weighing 1½ pounds that the two parts of the loaf can be split by unscrupulous grocers, re-wrapped and sold for one loaf for ten cents (B. 474). The objections raised in this case were presented to the legislature (B. 475). I have never manufactured a product to comply with the bread law to determine what its condiments would be or its character as a manufactured product (B. 475). In attempting to comply with the bread law I wouldn't attempt to make the product vastly different from the bread I now make (B. 476). The difficulty concerning the splitting

of a cent on sale price occurs when the retailer sells to the public. It is quite possible in making sales to the retail grocer so that the split cent theory has no bearing upon the wholesaler (B. 476). It is possible and I have been accustomed in times past to increase or diminish the finished product put upon the market within a variance of one ounce or possibly two ounces of a loaf previously produced (B. 480). We advertised that the weight of our Betsy Ross bread would be increased by a certain number of ounces, I don't remember what it was (B. 481). I have not tried and have not caused to be tried any experiments which would produce a product in conformity with this law (B. 482). I remember the bread produced in court concerning which it was testified to have been baked under ordinary conditions and to comply with the law and that product would ordinarily and customarily be known to the public as bread (B. 483).

[fol. 62] Dr. HARRY E. BARNARD

Direct examination:

I am Director of American Institute of Baking, Minneapolis. Have always been in public work. Was formerly in charge of enforcement [fol. 63] of food laws in New Hampshire, then was Food and Drug Commissioner of the State of Indiana. My line of work has taken me into the manufacture and distribution of bread, and I am familiar with the process of baking bread. The chief change in bread after it is baked and for 24 hours, is the loss of moisture, but it loses none of its nutrient value. It is impossible for the baker to control the evaporation from his bread, because he cannot control the temperature of, nor the humidity in the atmosphere, and neither can he control the conditions under which bread is handled either in the bakery or at the store from which it is sold (B. 284-5).

It is not possible for the baker to predetermine the quantity of dough which must be put in the oven to produce a loaf of bread which when baked will weight an exact amount, because of the uncontrollable conditions which I have mentioned. The uncontrollable element starts in the dough room while the fermentation process is going on, and these elements exist whether the dough is scaled by hand or by a machine. That is true even in the laboratory, but is much more true in bakeries where conditions are subject to all sorts of variation. In the laboratory the work and the tests are most accurate because of the better equipment and the use of exact appliances as near as possible (B. 287).

It is impossible to scale dough so that the resulting loaf of bread will weigh not less than 16 ounces, nor more than 18 ounces during the 24 hour period after baking, because the 2 ounce tolerance is too narrow. The baker in his endeavor to make a loaf which would al- [fol. 64] ways, in the 24 hour period, weigh at least 16 ounces, would constantly be scaling his dough so heavy that many a loaf would weigh, when removed from the oven, more than 18 ounces, and also might weigh more than the 18 ounces during the 24 hour period, depending upon the conditions in which it should be kept (B. 288).

A loaf of bread is like a sponge filled with water and its porosity depends on the fermentation of the dough, the character of the flour and a number of uncontrollable factors. A sponge full of water in a cool and humid atmosphere will not lose water very rapidly and neither will a loaf of bread where the temperature is low and the humidity is high, but with air currents blowing through the room, both will lose water rapidly (B. 288). I am familiar with the conditions prevailing in modern bakeries and it is not possible for a baker under present day conditions to so scale his dough as to be certain that he won't have 25 loaves of one unit weighing more than 18 ounces, nor less than 16 ounces on the average, in the 24 hour period after baking. Only water is lost by evaporation and no nutrient value is lost by such evaporation.

The bread contains just as much food stuff, but at the end of 24 hours it isn't as good from the psychological standpoint because it would not present such a good appearance, but after being consumed it would be just as good as if eaten fresh. The nutrient value of a loaf is not lessened by the loss of moisture (B. 289-290).

Bread made from high absorption flours loses water more rapidly [fol. 65] than bread made from low absorption flours, because the latter flour has a lesser moisture content and is a poorer flour both from the standpoint of the baker and the consumer (B. 290). Bread made from the poorer qualities of flour, that is, low absorption flour, will not evaporate as much in a given time as will bread made from the best flour (B. 291). Naturally I would think that if a baker is required to maintain a certain weight of loaf and the price of the ingredients should increase, he would endeavor to keep from losing money by using cheaper raw materials (B. 291).

I have been engaged in research work in the matter of foods for twenty years and for fifteen years for the federal government. The government committee, of which I am a member, has been endeavoring to define bread and to set up standards of composition, but no conclusion has yet been reached, and the matter is still under investigation. The most important question is that of moisture content in bread, because it is the most important thing in connection with setting a standard for bread, as the moisture content varies greatly; and for the protection of the public the idea is to standardize the process and have a maximum moisture content if that can be done. The committee has reached the conclusion that it is not possible to establish a standard by reference to moisture content, but on the contrary the committee has concluded that the only fair standard will be to state the amount of dry matter which will be contained in bread. For instance, that a loaf labeled one pound in weight shall contain not less than, say 60% of dry matter, so then it won't make any difference whether the loaf labeled one pound is fresh or dry if it is ascertained that it contains the 60% of dry matter. The com- [fol. 66] mittee is trying to establish a workable standard and a workable definition for bread.

Cross-examination:

It is possible to control the temperature of the room and of the oven within limits, as the ovens may be cold as over Sunday. The

conditions in the dough room where fermentation takes place, are controllable in the modern bakery, because such room is built with insulated walls and the temperature can be controlled, but that is the only place (B. 295). After fermenting, the dough leaves the dough room and from that time on it is exposed to all kinds of changing conditions of humidity and temperature. It is not possible to tell what percentage of weight is lost from the time the dough is scaled until the bread is removed from the oven, because that depends upon the quality of the flour, the amount of water going into the dough, the temperature of the oven, and the number of minutes the bread is baking (B. 296).

The Indiana law of 1919 provided only for a minimum tolerance. I don't see how you can provide for a maximum tolerance. I have done a great deal of experimental work in the laboratory to determine the possibility of complying with a maximum and a minimum weight law. There are conditions where it may be done, but they are not practical conditions because it would require equipment to measure to a fraction of a milligram. In my experiments I sealed the loaf up air tight, and the average loss in 24 hours was less than two ounces (B. 298). The weather conditions are the greatest variables to deal with. In making our tests we endeavored to supply as many variables as possible so as to have the conditions which the [fol. 67] baker would have to meet in a year's business. It takes from one hour to six or seven hours to mix a batch of dough, ferment it, prove it, and bake it, because the variations are so great. In the smaller bakeries it may be ten hours. The tests which I have made have been going on for six months or more. We did not make the experiments because of the passage of any law (B. 300). I receive my salary from the American Institute of Baking which is supported by the bakers. The purpose of the Indiana law was to have a pound loaf of bread weigh one pound and to make the law workable and protect the consumer we provided for a minimum tolerance of not less than one ounce, but imposed no maximum tolerance (B. 303-304). Bread could be made and kept within a two ounce tolerance, maximum and minimum for 24 hours, if made and kept in an insulated room, but such bread kept under such conditions would, after being taken out, evaporate and then weigh less than the 16 ounces to the pound (B. 305).

Redirect examination:

There can be no objection to the consumer getting 20 ounces of bread for a pound loaf, but it would be bad trade practice (B. 308). What I said about the possibility of making bread within the two ounce toleration referred to the experimental conditions named, but in the commercial baking of bread it is impossible. In the experimental conditions the bread would be kept in an air tight case the moment it came from the oven so there would be no evaporation, and that is not possible in commercial baking of bread. Bread kept sealed up would not be edible bread in a short time,—would not be bread that we eat daily (B. 309). Bread is in a class by itself [fol. 68] as food. There is no food subject to so many external influences which may change its character and influence its weight

as bread, and that is the difficulty that the members of the government committee have had in trying to standardize bread. While thermometers are fairly accurate for measuring atmosphere, for measuring humidity they are not (B. 310).

Recross-examination:

My view as to the impossibility of complying with the Smith Bread Law is a real view, not theoretical, but I have never been a baker. Bread might be made which would fall within the limits of the Smith Bread Law, but it would not be what we call commercial bread (B. 312). I do not believe people would eat it. It would not be such a bread product as the people demand today (B. 313).

Redirect examination:

One of the chief functions of the American Institute of Baking of which I am the head, is laboratory work, and the tests and experiments in regard to bread were made by Dr. Morrison under my direction and supervision. The experiments we made in regard to bread were with a 60% absorption wheat patent flour and the loaves were weighed when baked and 24 hours later, and showed a shrinkage under humidity of 33%, and temperature of 88 degrees of 2.15 ounces per pound. By increasing the humidity and decreasing the temperature, the shrinkage was 1.58 ounces, and a further increase of humidity and decrease in temperature showed a shrinkage of 1.19 ounces (B. 412). From my experiments I deduce that the moisture [fol. 69] content of a loaf of bread is so delicately adjusted that the slightest change in humidity conditions or in temperature conditions will greatly increase or decrease the loss of moisture, and so from our experiments I say it would be impossible to make bread to comply with the Smith Bread Law. From my own personal knowledge I know that the results obtained in our experiments are accurate. (B. 413).

Recross-examination:

The experiments were started on one day and finished the next day within a 24 hour period. There were 45 loaves in the total test. The general average for the 45 loaves was 1.64 ounces loss of moisture. The humidity and the temperature were controlled when the tests were made as a special apparatus was used. The temperature and the humidity in the bakery can be controlled in a dough room, but in no other part of a bakery. Conditions in the average bakery are uncontrollable from the moment the process of baking starts until the bread leaves the oven, and the baker only endeavors to keep the conditions of variation as uniform as possible. In our experiments the loaves were kept 24 hours unwrapped.

Redirect examination:

The loaves were baked under the same conditions but were kept after baking under different conditions. Results for a greater number of loaves would have been very nearly the same undoubtedly.

It would not matter how many loaves would be used, the temperature and humidity being the same; and the loaves being from the same dough you would get approximately the same average variation in all the loaves.

[fol. 70 & 71] Recross-examination:

We made the round top loaf as that is the loaf customarily sold in this country and the shape of the loaf affects the variation very materially. The round top loaf does not lose as much moisture as a split top on account of the greater opportunity in the latter for the gases to escape when the top is split open. The crust is not quite so thick at that point. We did not experiment with the oblong loaf. The conditions after the bread is baked are not controllable (B. 417-418).

In experimental work in laboratory I baked a loaf of bread which from time of the scaling weight until it came out of the oven lost less than ⅛ ounce. In keeping bread 24 hours the average loss was less than 2 ounces. Some loaves lost very little (B. 298). 45 loaves of bread baked by Dr. Morrison and kept unwrapped for 24 hours showed an average loss of 1.64 ounces. (B. 414).

[fol. 72] Louis W. Haas

Direct examination:

I am in charge of the manufacturing, efficiency and laboratory department of W. E. Long Co., promoters of the baking industry in Chicago, operating over the United States. The company is recognized among bakers as an authority on the business of the modern bakery. I have been engaged in the baking business since I was ten years of age, and my work at the present time involves the study of how to improve and better bread making conditions, and in connection therewith I visit the various baking plants throughout the United States. I am a bread baking expert and have recently made experiments in the making of bread under different temperatures and different humidty with a view of determining the evaporation from loaves in the 24 hour period after baking. I prepared Exhibit 4 which shows the results of my experiments made under conditions which were carefully controlled. And the bread was, after baking, kept in a chamber in which the humidity and temperature were controlled and kept constant for the 24 hour period. The conditions [fol. 73] were created artificially in our laboratory in Chicago to make them as accurate as possible. A bakery could not maintain such conditions (B. 313-316). I made 16 tests of four loaves in each test in September, 1921, all made under different temperatures and different degrees of humidity. The minimum temperature was 76 and the maximum was 96 degrees. The minimum humidity was 18, and the highest was 55. Those are the maximum ranges of humidity and temperature in bakeries. We weighed the bread after baking and at the end of 24 hours, using a scale that enabled us to

weigh .003 of an ounce, such scale being much finer and more accurate than is used in bakeries. The shrinkage in the loaves during the 24 hour period varied from 1.13 ounces up to 2.68 ounces. We used the best flour we could obtain for bread making, and that is strong or high patent flour such as is generally used by bakers to make bread (B. 316-318). In our experiments we did not find it possible to make bread which would not under certain conditions shrink more than two ounces to the pound during the 24 hour period after baking. It could be done if the humidity is very high and the temperature low in the place where the bread should be kept. A half pound loaf evaporates more in proportion than a pound loaf; that is, the smaller the loaf, the greater proportionately is the evaporation; so a large loaf wil not evaporate so much in the 24 hour period proportionately as will a half pound loaf. This is due to the ratio of the surface of the bread, a small loaf having a comparatively larger surface to its weight than a larger loaf, and in a small loaf the distance from the outside to the center is much less than such distance in a large loaf. So a law allowing the same proportionate evaporation for the weight of the loaf is not scientifically a correct [fol. 74] law (B. 318-319). The surface of a large loaf is smaller in proportion to its weight than the surface in a small loaf; that is, the mass of bread in a half pound loaf is less in proportion to its surface than the mass of bread in a pound loaf. Our experiments have shown that to be the fact. In making our experiments the large loaf weighed 18 ounces out of the oven and the small one 9 ounces (B. 321). Bread made from the best, or strong flour has more water in it than bread made from poorer grades of flour, so the evaporation is greater from good bread than from the poor quality of bread (B. 321).

I do not think it is possible to fix accurate standard weights of bread without taking into consideration the moisture content. I think the only feasible way is to fix the dry content of bread which is the actual food value (B. 321). That is because bread is so variable, due to atmospheric conditions, that it is impossible to set a loaf of bread and have it weigh a certain number of ounces at a given time. The evaporation from the loaf of bread does not affect the nutrient value of the bread as the only loss is in the form of distilled water. So a law fixing the tolerance only upon the weight of the loaf is not scientific. I do not think the Smith Bread Law can be complied with in the practical operation of baking because under normal and average conditions in the operation of a bakery there would be a greater shrinkage than the two ounces to the pound. Our experiments demonstrated that fact (B. 322).

Cross-examination:

I keep in touch with bread making and try to find ways and means to produce better bread. I have not made any experiments under [fol. 75] the Chicago ordinance. I never heard of anybody trying to comply with that law, and in my experience there I have found

bread that greatly violated the Chicago ordinance (B. 324). We collect bread from the open market in Chicago and judge it and weigh it at the same time. Bread making is a matter of scientific knowledge. Dough is affected by the humidity and atmosphere, the humidity being in dough rooms about 70 to 75. My tests were made on bread, not on dough. High humidity must be artificially created. The humidity affects proving the bread, which means raising of the dough after it is put in the pans, which process is usually done in the dough room or an enclosed chamber with the outside air shut out so that the temperature and humidity can be controlled. This must be done in the dough room because of the variation in the outside atmosphere, especially in fall and winter (B. 328). It is not possible to control heat in the oven very satisfactorily, but the surrounding atmosphere does not affect such heat. The scaling of dough, that is, dividing it to go into the oven, is usually done in a separate room from the dough room and which room is not under control of humidity and temperature. The dough remains in such room from 15 to 30 or even 60 minutes (B. 329). In this process dough loses a small amount of water and also gas. The finished product (the bread) is most seriously affected by the temperature and the humidity after it leaves the oven. With a low humidity the bread will dry out faster than when the humidity is high. However, bread comes out of the oven very hot and will lose moisture under all conditions (B. 330). With a 60% absorption flour, that is, a high quality flour, the loaf of bread coming from the oven would [fol. 76] have close to 40% of moisture. During the 24 hour period after baking, bread will be continually evaporating and will not absorb moisture unless possibly the humidity should reach 100%, then a slight change in temperature would cause water to be deposited on the bread. A loaf after the moisture in it is evaporated, will absorb moisture under certain conditions, but that does not occur within the 24 hour period unless the humidity gets so high as to cause condensation (B. 332). My tests were made in the laboratory. The first loaf weighed 18½ ounces when it went into the oven and 16½ ounces when it came out of the oven and lost 1.28 ounces in the 24 hour period after baking, which made it less than 16 ounces. If more than 18½ ounces of dough had been put in the oven it would probably have weighed not less than 16 ounces at the end of the 24 hour period, under conditions which were maintained in the laboratory. The more dough that is put in the oven, the greater is the weight of the loaf when baked.

The reason why we did not use more dough was because we would then possibly have a loaf which would exceed the 18 ounces when it came out of the oven. It is easier for an inspector to determine the standardization of a loaf of bread by weight and size rather than by the dry material or food value contained in the loaf, but bread being so changeable in weight on account of the variable conditions, I can't see how it is possible to do justice that way (B. 338). The dry content of a loaf of bread is determined after eliminating the water. The loaf is weighed and then it is thoroughly dried out and

weighed again. 2½ ounces might be a sufficient tolerance in bread at times, but I would not say that 3 ounces would be enough tolerance [fol. 77] under all conditions. I am satisfied that two ounces tolerance is not enough. The loss by evaporation in the loaf of bread is greater during the first 6 hours after baking than it is in the succeeding 6 hours and so on. Bread being hot just after it comes out of the oven, loses more rapidly in weight than after it is cooled (B. 382). The loaves used in our experiments were unwrapped. I think if they were wrapped they would shrink much less.

Redirect examination:

The tables showing the results of our experiments are in grams. 28.34 grams make an ounce. The tables show the kind of dough, the amount of water put in the dough, the kind of flour used, the sealing weight of the dough, the weight of the bread when it came out of the oven, and the weights at different times thereafter and the losses in weight. They also show the temperature and humidity where the bread was kept for 24 hours. In the table, Exhibit 4, the actual loss in grams is stated in the loaf of bread weighing 16½ ounces, and the calculation is made from that as to the shrinkage in an 18 ounce loaf when baked (B. 346). The loss in ounces in column 15 of Exhibit 4 are the mathematical conclusions from the basis of gram loss in column 8 on the same loaf. Exhibit 4 shows the temperatures and humidities in the various tests made in the laboratory. Bread made from a strong glutinous flour, or the best flour, has more food value than bread from a low grade flour, and the good quality bread has more water in it and thus evaporates more in quantity after being baked. If tests had been made under greater variations in both [fols. 78 & 79] humidity and temperature, there would have been shown greater shrinkage in the 24 hour period after baking (B. 349).

We got the bread baked in Chicago simply for our own purposes and without regard to the Chicago ordinance.

The humidity and temperature in bakeries vary with the changes in the outside atmosphere, because air is constantly entering the establishment through windows and doors. The figures in column 15, Exhibit 4, correctly reflect the evaporation of an 18 ounce loaf when baked no matter what the proportion of dough was when put in the oven (B. 351).

Recross-examination:

The figures in Exhibit 4, column 15, are mathematically, physically and chemically correct (B. 355).

I never made any experiments to determine what the weight of the bread put on sale in Chicago was. I have been engaged in plants outside of Chicago not operating under the Chicago ordinance (B. 324). Bread making may be reduced to a matter of expert scientific knowledge and certain results may be looked for (B. 326). Condition of h-midity in dough rooms is artificially created (B. 327). The heat of the oven is not dependent upon either the temperature or humidity of the surrounding atmosphere (B. 329). The reason

my tests did not comply with the law is that I did not put enough dough in the loaf (B. 335). The loaves weighed about 16½ ounces when they came from the oven and none of them complied with the law (B. 336).

[fol. 80] PETER G. PIRRIE

Direct examination:

I am head of the baking department of the Dunwoody Institute, Minneapolis. My work is to take journeymen bakers and to fit them for positions as foremen and superintendents in bakeries. My line of work during my life has been largely connected with the making of bread and the study and manufacture of all things used in the making of bread. Our concern puts commercial bread on the market and is a commercial bakery and I have charge of it. We have a baking school in the institute. Bread made from good flour loses more after baking by evaporation of the moisture than bread made from poor flour. High absorption flour is called the best. There is [fol. 81] no way to predetermine the quantity of dough to put in the oven in order to produce a fixed weight loaf of bread (B. 388). There is no such process or method known to the bakers. There is no article of diet which has such uncertainty surrounding its making as has bread, and there is no other article of diet in the same class with bread as a food (B. 389). Between August 2, 1921, and October 19, 1921, I made experiments with 164 loaves made from the best class of flour and under normal conditions. I found that on two of the five days during which the experiments were carried on that practically all of the loaves of bread shrunk in weight during the time between weights, the first weight being taken within one hour after the bread came out of the oven. I did not take into consideration what evaporation might have taken place when the loaf was hot and before it was first weighed and such evaporation is not included in my figures, and if included would increase the shrinkage stated by me (B. 391). It is not possible for a baker today to comply with the Smith Bread Law because the average weight of the loaves on certain days might weigh more than 18 ounces on coming from the oven, and at the end of the 24 hour period might weigh less than the 16 ounces (B. 392). If dough is scaled at 19 ounces it may come out of the oven weighing 18 ounces or only 17 ounces, or more or less (B. 395).

Cross-examination:

I say as an expert baker of bread that a high absorption flour will produce bread which evaporates more rapidly than bread from poor flour. There might be a great variation, depending upon conditions of temperature, water used, etc.

[fol. 82] In making my experiments I did not start out with the effort to make a loaf of bread which would weigh not less than 16 ounces, nor more than 18 ounces during the 24 hour period after baking. I simply experimented with ordinary bread baked in the

ordinary manner to find out how much it lost by evaporation and give the results of my experiments. If I started out to produce a loaf within the two ounce toleration, there would be days when I might be able to do so, and other days when I positively could not do so (B. 399). Conditions in Nebraska are more conducive to evaporation than in some other parts of the country, because of the higher temperature and lower humidity prevailing. As a result of my experiments at least 50% of the loaves baked did not comply with the Smith Bread Law. I would say that 100 of the loaves did not comply with such law and that the balance did comply with the law. We were not making any special effort to produce a loaf that would comply with the law (B. 401). I think bakers could come nearer complying with the law by reducing the quality of the bread because of the lower evaporation in both flour and bread (B. 402).

Badex is a product prepared mainly from corn starch, and the manufacturers of Badex claim that it reduces the quantity of sugar which the baker needs to use and tends to prevent bread from becoming stale (B. 402).

Redirect examination:

Badex is used by bakers in some parts of the United States. It does not have any effect upon the drying out quality of the bread nor in keeping the bread moist. I used no Badex in my experi-[fol. 83] ments (B. 404). I do not know of any way whereby a baker during the year could control the conditions and the elements so as to make bread within the elements of the Smith Bread Law (B. 404).

The uncertain elements beyond the control of the baker are:

1. Evaporation in raw materials and in their storage.

2. A baker can only approximately, in any event, control temperature and humidity.

3. Errors which creep into the weighing and measuring of ingredients for the dough.

4. Loss in mixing.

5. Impossibility of accurately controlling temperature and humidity during fermentation of the dough.

6. Loss during fermentation because of the nature and the proportion of the ingredients in the dough.

7. Conditions existing in and about dough dividing.

8. Changes in weight by evaporation or absorption in handling the balls of dough after being weighed or divided and until they go into the baking pan.

9. Evaporation during the proving process.

10. Changes during the baking process in the oven.

11. Losses after bread leaves the oven and is transported by mechanical devices to some other part of the plant for cooling.

12. Uncontrollable weather conditions after the bread is baked.

[fol. 84] 13. Loss in handling the bread on shelves, racks, or in boxes, etc. (B. 405-7).

If bread should be left in the oven long enough to evaporate all the moisture, it would not be good or salable bread, and in making the experiments we always consider the popular taste and demand for bread of good quality. Every one wants good bread (B. 408).

Recross-examination:

I could produce a product which would comply with the Smith Bread Law and my competitors could do likewise but the product would not be salable. It would not be wholesome bread and it would not serve the purpose of bread (B. 409). The tendency is for bread made from the stronger flours to use the greatest amount of water (B. 410).

In meeting changed conditions the same elements in making of bread would be considered as are now considered (B. 399). I could produce a product which would comply with the law disregarding the question of quality. There would be nothing in the product endangering health (B. 409).

[fol. 85] CHARLES W. ORTMAN

Direct examination:

I am a retail baker in Omaha, making about 2,000 loaves of bread per day. The smaller bakeries range from 200 to 500 loaves per day. My bread is sold direct over the counter to the customers in my store. We sell our bread direct to the consumer from three to five hours after it is baked. At times I could comply with the Smith Bread Law, but at times, owing to conditions, I could not. Atmospheric conditions and changes in ingredients are beyond control. There is no way whereby bakers can predetermine the quantity of dough necessary to produce a given weight loaf. I am a practical baker of 35 years standing and am familiar with all the methods used in [fol. 86] bread-making. Temperature and humidity are great factors in the manufacture of bread. High absorption flours, that is, the best flours, make bread that evaporates most in a given time. The better the quality of the bread, the greater the evaporation. I could come more nearly complying with the law by making bread of cheap flour having a low absorption, but even then I do not think I could comply with the Smith Bread Law, but there would be less chance of violating it because there is less moisture in the dough and the evaporation is much less after the loaf is baked. It is the dough and the bread from the best flour that has the most water (B. 378-380).

Cross-examination:

We use both stiff and slack dough. Some bakeries prefer one and some another. It is the quantity of water that regulates the stiffness or the slackness of the dough. Each individual baker determines for himself. Since the Smith Bread Law went into effect we have tried to comply with the provisions of that law and have weighed our bread and found that there would not be a day in the week when the inspector could not come in and find that we were not complying with the law. The first loaves in the oven vary from 1 to 1½ ounces from the last loaves in the oven. I think a majority of our loaves will comply with the law and at times likely 75%. I do not think 75% of our daily run will comply with the Smith Bread Law. Of the loaves that did not comply with the law, some were below the minimum and some were above the maximum from ½ ounce to 1½ ounces. I do not know whether there was a period of 15 days in which I could not comply with the law. My statement is based upon [fol. 87] practical observation as we go along with our bread from day to day. The flours vary. Sometimes we have to increase the quantity of dough in order to have it bake bread of a certain weight. It is much easier to comply with the law during three to five hours than during 24 hours. We only aim to carry over from one day to another about 300 or 400 loaves, except on Fridays. I weighed 5 or 10 loaves at the end of the 24 hour period to find out whether they were within the limit (B. 381-5).

Redirect examination:

There might be days such as we have in October when my whole output would be illegal within 24 hours after baking.

Cross-examination:

We dispose of our bread in from 3 to 5 hours after baking. Most of our bread during that period would comply with the law (B. 384). Loaves weighed by me at end of 24 hours were 5 or 10 in number and picked up at random (B. 385).

[fol. 88] AUGUST LOUIE

Direct examination:

I live in Council Bluffs and have been a baker for over 50 years. At present I am general manager of the Skinner Baking Co., which bakes bread and ships it into Nebraska. They have been doing it for 16 or 17 years. We ship much bread into Nebraska in less than 25 loaf lots of one size. Last month we had between 250 and 300 shipments of that kind into Nebraska which does not include the city of Omaha. Yesterday our wagons delivered in Omaha 148 shipments of less than 25 loaves each (B. 503). That represents the fair average of business done by us in Omaha and in Nebraska from day to day. Our bread comes in competition with the bread

made by the Nebraska bakers and we make practically the same kind of bread as is put on the market by the Nebraska bakers, only a little better.

[fol. 89] Cross-examination:

In case of accident the loaves sometimes might show a difference of 2 ounces. (B. 506.)

We regulate the weight of the loaf according to the cost of the ingredients. We are not able to get all the loaves alike. We scale dough by machinery and ocasionally the pockets get out of order and quite a number of loaves will result that will be too light or too heavy and we have had them exceeding two ounces too much or two little. About one-third of our product goes into Nebraska. We have not many customers in Omaha who buy bread in greater shipments than 25 loaves. I think not more than half a dozen (B. 505-507).

MILTON PETERSEN

Direct examination:

I am general office and sales manager for the Peterson & Pegau Baking Company of Omaha. The company ships to 462 towns in seven different states, mostly by express in cars which are heated by steam pipes in the winter, which affect the boxes of bread leaning against them, and which dries out the bread. We make many shipments of only 20 loaves of one unit, as customers buy in small quantities in order to get fresh bread. Many customers get two shipments daily. The demand is for fresh bread, and bread is most fresh when it comes from the oven (B. 38-39).

Cross-examination:

One-third of our total output is not wrapped because of a large demand for bread that has a crisper crust. We sell both wrapped and unwrapped bread to the same customer.

[fol. 90] Redirect examination:

Wrapping bread keeps it softer as it retains the moisture. Unwrapped bread evaporates much faster than wrapped bread. The wrapping paper is waxed on one or both sides in order to make it impervious to the atmosphere. With high humidity, dry unwrapped bread will absorb moisture. Evaporation from bread takes place in proportion to the dryness and warmth of the atmosphere. This I know by personal experiments in our own plant. There may be a high or low humidity in either a hot or a cool atmosphere, and a dry atmosphere may be either hot or cool (B. 43-44).

Recross-examination:

The humidity in a bakery varies with the atmosphere outside. We have no way of regulating the temperature in the baking room.

The loaves when baked are put on racks in the baking room, or in some of the other rooms in the plant to cool. No room is specially arranged for the cooling of bread and the only ventilation is by opening or closing windows, or such like (B. 45). I helped make the tests in our bakery. I saw the dough scaled and was there when the loaves were taken out of the oven and weighed and when they were weighed at the end of the 24 hours. We scale by machinery, but the tests, in order to be accurate, were scaled by hand as machinery is not accurate. The variation may be up to three-fourths of an ounce per loaf and there is no way to correct it. Dough is scaled by a divider which has a series of automatic plungers and pockets into which the dough is pushed in its most active period of fermentation, causing bubbles of carbon dioxide gas which being [fol. 91] variable cause variation in the weight. In our tests we scaled the dough accurately. The air in the dough room is moist because the room is insulated and the air is washed through various sprays of water, the air then being pumped into the room. That is done to assist fermentation.

We have been baking bread in pound loaves that would average 16 ounces, and 1½ pound loaves to average 24 ounces, when taken out of the oven. We try to scale the dough so that the resulting loaves will approximate 16 and 24 ounces, but it is approximate only. There are 1,000 pounds in a batch of dough scaled at about 20 ounces to the loaf, but there is a variation between the individual loaves going through the divider. We cannot take any quantity of dough and know beforehand exactly how much to put in the oven to make loaves of 16 and 24 ounces respectively. It is impossible to predetermine the quantity of dough and make a loaf of a given weight when it comes out of the oven, and also a given weight 24 hours after it is baked (B. 52). I have tried it many times. To be absolutely sure to produce a loaf weighing not less than 16 ounces during the 24 hour period, the dough would have to be scaled at 20 ounces. The dough used in our tests was part of our regular run of dough, kept in identically the same condition. I saw the dough before it was scaled and it was well mixed and uniform.

Redirect examination:

The variation in small loaves is from 2 to 3 ounces, and on the larger loaves correspondingly. We produce about a million loaves [fol. 92] a month, and where we advertise 16 ounce loaves, it refers to the loaves as a whole, though there is great variation in many loaves, but the average for the million loaves for the month would be 16 ounces—many over and many under because of the variable conditions mentioned. It is not practical to scale dough by hand because of the cost and time, and the scaling must be done by the divider about which I have testified (B. 56). There is no method known to make a lump of dough so accurate as to produce certain results. The conditions under which we made the tests were the usual conditions in our bakery—neither special conditions, nor

special ingredients, and the tests made reflect the different climatic conditions from a cold day to a hot day (B. 57). There are many days in the year when the air is surcharged with moisture and during such time the loaves dry out very little and the crust is soft and soggy, and on the other hand there are many days in Nebraska when the atmosphere is very dry and hot and especially during the summer months when the evaporation from loaves of bread is very strong. Under normal conditions the moisture in a loaf of bread is not all evaporated, but if conditions were right the loaf might become totally dry (B. 58).

To arrive at an average of approximately 16 ounces to a loaf we would have to scale somewhere near 20 ounces of dough, that is, to produce a loaf which would not be less than 16 ounces during the 24 hour period, and thus many of such loaves would be close to 19 ounces because of the uncontrollable factors mentioned. Even in scaling 20 ounces, though all of the loaves would be above 16 ounces when they would come out of the oven, yet before 24 hours [fol. 93] some of them would be under that weight. The moisture in one batch of dough is equally distributed so that each loaf gets an equal quantity of moisture. The reason why we must put in an excessive amount of dough is the uncertainty of evaporation because of the uncontrollable factors which have been mentioned, and there is no way known to the bakers to control evaporation. If we could know beforehand that a certain day was going to be an extremely dry one, then we could scale more dough for the loaves, but if the day did not turn out to be dry then the loaves would be over weight (B. 61). So that while we might put in enough dough under all conditions, both wet and dry, to have a loaf of not less than 16 ounces at any time, yet there would invariably be a number of loaves which would be over 18 ounces in weight. That has been determined by the experiments in our baking business. Dough must be put in the oven when the fermentation reaches a certain stage, otherwise it would become sour (B. 62).

Recross-examination:

In sheet Exhibit D, shown in evidence, the atmosphere was moist and there wasn't much evaporation. In Exhibits D, sheet 1, E sheet 2 and F sheet 3, where the conditions were moist and moderate, none of the loaves were under 16 ounces at the end of the 24 hour period (B. 65).

We could not store bread in the dough room because there isn't space sufficient, and we couldn't make the other rooms like it, because the dough room cost $20,000, and is a moist room. Bread must not be kept in a moist room or where there is no circulation of air, because the bread gets soft and develops a musty smell. [fol. 94] Where a room is wet and close, with no air, it is not sanitary. In the dough room the air is moist because it is washed, and that keeps it fresh and the gas escapes (B. 68).

Redirect examination:

In the cooling room where our bread is ordinarily kept there is an atmosphere that has a fair amount of draft through the room at all times. It is a large dry room with changes of air, the air being the same as outside. Our tests were made under normal conditions. The greatest variation in loaves was 4½ ounces. On Exhibit E, only one out of twelve loaves was legal when it came out of the oven. Three were illegal both at the beginning and the end of the period, that is, three loaves were overweight when they came out of the oven and were under weight at the end of 24 hours. On Exhibit F six loaves were under 16 ounces at the end of the 24 hour period though they were all 18 ounces or more when taken out of the oven. In the summer months we have very long periods of dry and warm weather and in the winter dry and cool weather with different kinds of atmosphere all the time. There are days in the year when the air is very moist. All the conditions mentioned, of temperature and humidity, are beyond the control of the bakers.

Direct examination:

The experiments set forth in Exhibit 6 were made under my personal supervision, and were made by the superintendent and foreman in our plant. We made 60 experiments with one pound and one half pound loaves from September 20, 1921, to October 12, 1921. [fol. 95] Experiments were made under normal conditions, that is, the conditions represented in different places in our bread rooms where different temperatures and humidities are found which will correspond to the different temperatures and humidities that would prevail throughout the year. In making the experiments we attempted as far as possible to have normal conditions which would prevail throughout the year. We baked 330 loaves, 30 experiments of 6 loaves each, and 30 experiments of 5 loaves each, 22 out of 30 of the one pound loaf experiments showed an evaporation in the 24 hour period after baking of more than two ounces and 8 of the experiments showed an evaporation of less than two ounces (B. 487).

With the half pound loaves, 22 out of the 30 experiments showed an evaporation of more than one ounce; one showed exactly one ounce evaporation and 7 showed less than one ounce evaporation in the 24 hours period after baking. The greatest evaporation in the one pound loaves was 3.73 ounces, which is nearly four ounces, and the minimum shrinkage was 1.33 ounces. In the one-half pound loaves the greatest shrinkage in the 24 hour period was 1.9 ounces which is almost two ounces, and the minimum was .7 or about two-thirds of an ounce (B. 488).

The loss to my company by enforcement of the Smith Bread Law is the advertising cost which we have been to in building up the business. To date we have spent $58,000 in advertising twin loaves of 1½ pound size, that is, each unit is three-quarter pound or thereabout. Twin loaves constitute 97% of the white bread sold to the retailers. Before this bread law was passed we installed a hedge machine 40 feet tall, and 40 feet wide, having 850 shelves capable of

[fol. 96] carrying 10 loaves each, the loaves being 20 ounces maximum. The machine will not operate with the loaves specified in the Smith Bread Law, and the cost of remodeling the machine I figure at $10,000 (B. 489). Then there are new pans that are required under the new law, $1600 wrapping machines $9900, which possibly may be remade but likely will have to be discarded (B. 490).

The public demand is for a 1½ pound twin loaf, each unit being three-fourths pound. Last year we tried making a smaller sized loaf but the public would not have it.

Cross-examination:

In making the tests we did not bake a twin loaf [illegible] any tests seeking to produce a product which would comply with Smith Bread Law (B. 492). We did not [illegible] ture and humidity except in the shop [illegible] ments. The hedge machine is not [illegible] with shelves. The machine takes [illegible] which bread is placed to cool [illegible] tinuously and is used because [illegible] bread on the chains [illegible] tests the bread was not [illegible] will not carry loaves of a [illegible] should be reconstructed (B. 495). [illegible] of more than 24 ounces.

If we had used a greater [illegible] [fol. 97] ments the result would have been [illegible] able limits of evaporation. The object [illegible] pound units is the cost of production and [illegible]

C. J. Heltbrich

I am a baker at Hebron, Nebraska, and have been [illegible] of fifteen years. I bake about 400 pounds daily. [illegible] experience that it is impossible for me to scale a loaf so as to determine its weight after baking as I use a brick oven and the first loaves put in are the last loaves taken out, and thus remain in the oven from five to ten minutes longer than the last loaves put in, and so they lose more moisture, and while the loaves might be legal when they come out of the oven, they wouldn't be after 24 hours on account of the evaporation which is governed by conditions of the atmosphere from time to time and also conditions in the oven. It is impossible for me to control these conditions. The smaller bakeries do not have any humidifiers as it would cost a small fortune to install one, and we could not afford it. In my community there has not been any demand for a fixed weight loaf. My customers demand good quality of bread (B. 102).

C. S. Jarnagin

I am a master baker with Jay Burns Baking Co., Omaha. I have been a baker and a baking expert all my life. For a time was with

riumph Bakeries, Cincinnati, Washburn Flour Company, Minne-
olis, and Fleischman Yeast Co., New York, as an expert baker, and
s with the United States Government in the Panama Canal Zone,
aving charge of all bread used by employes (B. 356-7). In both
ol. 98] experiments and in practical baking I have found that a loaf
bread weighing 18 ounces when it comes from the oven will lose in
poration from $2\frac{1}{4}$ to $2\frac{1}{2}$ ounces. There is the greatest evapora-
n bread made from good flour, and a loaf of bread made from
lost flour will evaporate more in 24 hours after baking than will
l made from poor flour, because the good bread, owing to the
amount of water required to develop the dough, makes the loaf
pores and it is more ready to evaporate than bread made from
or poor flour (B. 357). I made experiments recently under
conditions of temperature and humidity to determine the
from loaves of bread in a 24 hour period after baking,
sults are in evidence as Exhibit 5 (B. 358).
ments the greatest amount of evaporation of mois-
loaf during the 24 hour period was $2\frac{1}{2}$ ounces (B.

making graham bread and bran is not absorbent,
quantity of moisture which gets away more rap-
spelt loaves (B. 423). I know of no conditions
loaf could be baked so as to lose only 2 ounces
(B. 424). In the tests some of the loaves ex-
when they came out of the oven and some lost 2
ation and some $1\frac{1}{2}$ ounces. If we had put in less
the bread would come out weighing 18 ounces, or less,
have had loaves weighing $15\frac{1}{2}$ ounces at the end
the 24 hours as such has been my experience. I made
experiments where the batch of bread complied with the
B. 425). We cannot bake bread which will be certain in 24
after baking to weigh not less than 16 ounces and not more
18 ounces per pound loaf, that is, the year round; and especially
the spring and fall seasons and winter, because of extreme heat
extreme moisture, or because of extreme dryness in summer, and
able atmospheric conditions at all times. I never made any tests
the intention of trying to obtain a product which would comply
the law regardless of the quality of such product. The bread
not wrapped in the experiments. Wrapping bread stops the
poration to some extent (B. 425-27).

Redirect examination:

f we had baken more loaves of bread in our experiments the same
roximate results would have been obtained, that is, there would
e been about the same shrinkage in the loaves. I baked the two
es which have been cut and sampled by the court and lawyers
429), and the loaf which they all selected as the best (No. 2) is
le of 80% of flour and 20% of corn starch, while the other loaf

(No. 1) is the best quality bread made from 60% absorptive flour and no starch. No. 1 loaf has the best food value because No. 2 has only 80% of wheat flour in it. I know these facts because I baked both loaves (B. 429-430).

Recross-examination:

I wouldn't say that I could bake a quality of bread equivalent to No. 2 which would comply with the Smith Bread Law, but it will come nearer to complying with the law; but I never experimented on those lines because I never expected to reduce the food value of the bread (B. 431).
[fol. 100] I have never made any tests with the intention of obtaining a product which would comply with the law; never have at-t-mpted it. Bread in my experiments was not wrapped (B. 426). I made no evaporation tests on the bread containing cornstarch and which was selected by court and counsel for defendant as the best bread (B. 431).

P. O. L. PETERSEN

Direct examination:

I am sup-rintendent of the Petersen & Pegau Baking Plant, Omaha. Have been engaged in the baking business 34 years and most of the time in baking bread. I am familiar with the methods and conditions of bread-making and have recently made experiments in order to determine the evaporation of bread during the 24 hours after baking. Exhibit 6 represents the results of experiments, being 15 pages numbered from 1 to 15 respectively. The experiments were made under varying conditions of temperature and humidity as shown on the exhibit. Bread made from good flour has greater evaporation of moisture than bread made from poor flour. We use the highest grade of flour in making experiments (B. 363-5), that is, 65% absorption flour. The dates and hours when the experiments were made are shown on the sheets Exhibit 6. The results would have been the same in our experiments if we had used 25 or 30 loaves in each experiment (B. 369).

Cross-examination:

We were not unable to comply with the Smith Bread Law in all of these experiments, but in most of them. In our experiments the bread was cooled in the natural atmosphere in September. We made no change in conditions when making the experiments—just the ordinary method of experiments (B. 371). I don't think we could [fo'. 101] do any better than is shown in the experiments as they were made out of the whole run of bread (B. 372). The bread was not wrapped. Bread is left in our cooling room until it is sold or distributed. Bread packed in boxes would prevent some evaporation and also bread when wrapped prevents evaporation.

Redirect examination:

A large part of the bread made by our bakery is not wrapped. From my experience as a baker and my knowledge of baking conditions under which bread is produced today, the bakers of Nebraska cannot comply with the Smith Bread Law because they cannot control the conditions under which the bread is made. Some days they might comply with the law, but other days they cannot, because the things entering into bread-making are beyond our control.

Recross-examination:

We were not able to comply with the law in our experimental baking. The company did not tell us what results they wanted to obtain. They just told us to make the tests and find out how much the bread would dry out under the ordinary conditions. I was instructed to weigh the bread as soon as it was cool out of the oven and then 24 hours afterwards. I did not make experiments to see if it would be possible to scale a certain amount of dough which would be within the 16 and 18 ounces after baking (B. 375).

Redirect examination:

The experiments were all made under the usual conditions that [fol. 102] prevail in the bakery and made with usual ingredients used in making bread. There were a few loaves that complied with the law during our experiments as shown on Exhibit 6. The bread made is the same as was put on the market.

Recross-examination:

Even if some other bakers have experimented and obtained loaves of bread which would weigh not less than 16 ounces nor more than 18 ounces to the pound within 24 hours after baking, I still say that the Smith Bread Law cannot be complied with under all conditions. They might comply with the law under certain days but not all the time. Our experiments were made September and October, 1921, usually dry months.

I was given instructions as to how to conduct the experiment and orders as to what amount of dough to scale 21 ounces. Did not conduct the experiment according to my own ideas to determine the amount of dough to scale or whether it would be possible to comply with the law (B. 375).

[fol. 103] *Affidavits*

C. J. Helfrich, L. A. McThompson, P. O. L. Peterson, J. T. Stewart, F. G. Festner, F. Walden, G. F. Wilberg, N. R. Mount:

Are all practical bakers of some years' standing and state that it is impossible for bread to be baked in the present day bakeries and comply with the weights in the Smith Bread Law because of the utter impossibility of knowing beforehand how much dough must

be put in the oven in order to produce a pound loaf of bread which, when it comes out of the oven, will weigh not to exceed 18 ounces and [fol. 104] at the end of the 24 hour period will weigh not less than 16 ounces, and this because of the many uncertain and uncontrollable elements which enter into the manufacture of bread (B. 164-192½).

II

Defendants' Evidence

WILLIAM F. CLUETT

Direct examination:

I am Chief Deputy Inspector of Weights and Measures for Chicago. The ordinance marked Exhibit A was in force in Chicago from March 24, 1914, to August 4, 1918, when it was repealed, that is, certain sections, the amended sections made in 1918 being 188, 190, 191 (Exhibit B). There is an ordinance in process of passage at this time marked Exhibit C. The bakers generally in Chicago complied with the ordinance (Exhibit A). My department made frequent inspections and found very few violations as to weight of bread (B. 518).

There are about 5,000 bakeries in Chicago and there was about the same number in 1918 and at least 4,000 in 1911. We found very few violations of Exhibit B as to the weight of bread. In Exhibit C, the ordinance not yet passed, the three-quarter pound loaf is stricken out and in place of it is the half pound loaf, but outside of that the weights are the same as now existing. Under the new ordinance (Exhibit C) the tolerance is one ounce per pound under or one ounce over the 16 ounces (B. 519). In Exhibit B, the one pound loaf could not weigh less than 16 ounces nor more than 17 ounces, and the other weights proportionately, being a tolerance of one ounce to [fol. 105] the pound. The bakers were able to bake their bread within the one ounce tolerance (B. 520). Under Exhibit B the inspectors of bakeries and places where bread was sold would try out the loaves of bread at the time of inspection. There were a few prosecutions for violations of the law which were mostly for wrong labeling. I found very little trouble among the bakers in complying with the bread weight law (B. 522). I think the bakers can comply with the law by paying proper attention to the scaling of their dough before it goes into the oven (B. 523). I think a two ounce tolerance is large.

Most of the trouble with the bakers was on account of mislabeling. Bakers made no complaint that the one ounce tolerance was insufficient (B. 522). A two ounce tolerance is a very large tolerance. They would bring it down a good deal closer than that (B. 524). The new ordinance of Chicago 1921, provides for a tolerance of one ounce per pound either under or above the standard unit in an average of twelve loaves (B. 536).

[fol. 106] Cross-examination:

In 1911 I think there were from 25 to 50 wholesale bakeries out of the 4,000 bakeries in Chicago I had about 15 inspectors and the same number in 1914, and we now have about 21, and part of their duties is to inspect bakeries. They are divided up. Some of the inspectors attend to testing scales and measures and weighing devices; other inspectors follow up coal and ice and hay and grain dealers. I think in 1911 we had about eight men that might be called inspectors of bread and other commodities in the different stores and bakeries in Chicago. Today we have only about four men detailed for that work, that is, investigating bakeries and groceries to determine whether or not the standard weight bread law is being complied with. Bread is weighed up wherever it is found, such as in grocery stores, delicatessen stores and bakeries. About 15,000 of the smaller dealers handle bread in some way. We have about 200 square miles of territory in Chicago to cover and only a few men [fol. 107] with which to do it. So the men might inspect one place three of four times a year or maybe only once a year, and some of the places might be overlooked. I am not a practical baker and only as a layman do I know anything about the method of making bread and of its ingredients. I know whether bread tastes good or not, but as to the technical requirements I have no knowledge (B. 528). The violations that came in were mostly for wrong labeling. The purchaser was not cheated, but he would have his intelligence insulted. He would find a three-quarter pound label on a three-quarter pound loaf selling for 5c, and he would find a three-quarter pound label on a two pound loaf selling for something else. The only dependable information in the label was that the bread was baked by a certain party whose name was shown on the label and that the bread was made by union bakers because the label had a certain stamp on it. "That was our main trouble, that the union bakers did not care so much about what the label stated as long as it had the union stamp on it, and they were careless about picking out the labels to put on the loaves." They were not interested in their quality or weight, but they wanted the business unionized. They would have the different labels in different boxes adjoining each other, and if they were requiring three quarter pound labels they would be just as liable to stick their hand into one of the other boxes and so get a wrong label, but it wouldn't make any difference as long as the union stamp was on it. The purchaser could see just what weight of bread he was buying according to its label. The reason we cut out the three-quarter pound loaf under Exhibit C [fol. 108] was because its weight is hard to test by the eye and you have to put it on a scale to tell the difference between it and a pound loaf. If the loaf is labeled correctly, however there would be no chance of the purchaser being misled as that would identify the loaf, or the purchaser could have it weighed when buying it (B. 530-1).

The only objection to giving the purchaser 17½ ounces of bread when he is buying a pound loaf is that the baker is getting away from the standard sizes. That is the only object, because it is con-

trary to law. There is no objection from a commercial standpoint or a human standpoint or any other standpoint. There can be no objection to giving a man a little more than he is paying for if the dealer or baker wants to do it (B. 531-2). I do not see that the public can be injured in any way if it gets more bread than the label specifies. The main object of the ordinance is to prevent short weight so that a purchaser may not think he is buying a loaf of a certain weight when he actually gets a loaf of a less weight (B. 533). I do not know about the moisture content of bread. We have never gone into anything like that nor anything connected with the technical manufacture of bread, nor the ingredients that enter into it. Under the new ordinance (Exhibit C) 12 loaves of a pound label must weigh 12 pounds. Six might weigh 15½ ounces and the other 6 might weigh 16½ ounces, but together they would have to make exactly 12 pounds. If together they should weigh 12 pounds 6 ounces, then that would be a violation of the law, or even if they weighed together 12 pounds and one ounce, that would be a technical violation of the law. Under the law they must average out the correct net weight on the 12 loaves, that is 12 pounds. The change in [fol 109] tolerance in Exhibit C was made simply in the interest of uniformity and because the bakers made a request for such ordinance. There has been no demand on the part of the bakers to eliminate the three quarter pound loaf, but they were agreeable to it. There wasn't any demand on anybody's part that I know of to cut out the three-quarter pound loaf. This department requested that it be eliminated because it was so easy to confuse a three-quarter pound loaf with a one pound loaf by simply measuring it with the eye, but there has been no public demand for the changes. The bakers wanted more changes in the labeling provisions than anything else, because under the old law they had to have a label affixed to every loaf whether it was wrapped or not (B. 540). The bakers wanted the privilege of marking the weight on the wrapped loaves in addition to having labels or stamps or pan impressions on the unwrapped loaves showing the weight. Their complaint was with reference to the mechanical method of affixing the weight on the loaf (B. 541). If a purchaser should ask for a half pound of crackers and should get a package containing less than 8 ounces that would be a violation of the law, but if the purchaser were given a package containing more than 8 ounces we would not pay any attention to that. The maximum weight as applied to bread does not apply to any other article of foodstuff. No other article has a maximum and a minimum.

If the other articles of foodstuffs, such as crackers and cakes and the like, are marked with the minimum weight allowed by law, we are not concerned with it under the existing law. There is in milk and cream bottles a tolerance of over and under capacity for the [fol. 110] bottles, but that doesn't apply when the milk and cream is sold in bulk (B. 543). One can only purchase a given number of ounces of bread by having the load cut correspondingly. Bread is a peculiar article. It is not like something else where it is made up in pieces and put into a package to be sold for so many pounds

or ounces. Bread is baked into one mass,—one loaf by itself and we think that the loaves should be certain prescribed weights and that bakers should not be allowed to bake any kind of a loaf they want simply by saying it is so many ounces and bake it to a certain size because people must be protected in the weight of the loaf that they are buying. If the baker or dealer gives the purchaser a little more bread than the purchaser has asked for the public may not suffer, but I think it is unfair competition (B. 545). "As far as the customer getting more than he pays for, we have no objection to that, if the dealer wants to give it to him, well and good" (B. 546, Q. 3150). In other words, the public is not being cheated if it gets more than it is paying for. We do not pay any attention to the quality of the loaf, as no matter who is the baker, we only consider the weight and the labeling, though the loaves may represent different qualities of bread or weights. During the war period I think the Government formulas were so specific that it was impossible to vary the grades of bread (B. 547). I do not know about flour. My inspectors pay no attention to loaves containing starch or any other ingredient so long as the loaves come up to the specified weights and are properly labeled. We are not concerned with the ingredients at all (B. 548). I do not know whether a loaf containing 25% of corn starch is of equal food value with a loaf made or pure wheat flour or [fol. 111] not. I know nothing about the quality of bread. The only thing we are interested in is the weight and the labeling, and the ordinance simply provides that bread shall not contain any deleterious substance.

Redirect examination:

I think the old ordinance permitting a three-quarter pound loaf was subject to violation and a misleading fraud upon the public, because loaves slightly over three-quarters of a pound were sold for a pound as such a loaf might easily be mistaken for a pound loaf and particularly if it is a light loaf, and so correspondingly large. That was the reason for cutting out the three-quarter pound loaf, and that is the reason for the two ounce tolerance, one ounce above 16 ounces, and one ounce below 16 ounces (B. 550).

Recross-examination:

Artificially increasing the moisture in loaves of bread will not be a violation of the law if the bread comes up to the legal weight at any time within the 12 hour period, no matter how that weight has been increased so long as the substance put in is not deleterious (B. 552). My inspectors have to depend upon the word of the bakers and dealers as to whether the bread is fresh or stale but we have no means of determining the fact and are obliged to take the word of the baker or the dealer (B. 553). There is no agreement as to when bread becomes stale, so we provided that the dealer should determine such fact in selling, but I do not know how the dealer can determine [fol. 112] it except by the objections of his customers, and he will have to take the baker's word (B. 554).

J. W. Long

Direct examination:

I am Inspector of Weights and Measures in Omaha and have been for the last three years. I had occasion to weigh loaves of bread sold on the Omaha market in 1920 and have a chart prepared February 22 from the actual weight of the loaves weighed in the office and in the stores in Omaha obtained from different places (B. 563-4). In 1921 I had Mr. Smith go around to the various stores to weigh each kind of bread as shown on the map (Exhibit 2). The City Council of Omaha directed me to weigh bread and report variations, which I did and have the record shown on Exhibits 1 and 2.

Cross-examination:

I gave the figures to the City Engineer and he prepared Exhibit No. 1. The first loaf was brought into the office and weighed; then we got other loaves at various stores where bread was offered for sale. We would weigh two or three of them and sometimes more. The 15c. loaf weighed about 17½ ounces at that time. I think only one didn't. I don't know when the loaves were baked. I don't know what temperature it was kept in. Bread will remain soft under some conditions for sometime. I investigated all the bread represented on Exhibit 1. We weighed the bread on the store scales after first testing the scales. I don't know how many loaves of bread we weighed (shown on Exhibits 1 and 2) and I found the bread lying on counters, shelves and such like in the stores. All of the loaves [fol. 113] were wrapped. Some of the small bakers do not wrap their bread but I think all the big bakers do. I found loaves by the smaller bakers, but did not take them into consideration.

Thomas J. Dunn

Direct examination:

I am Assistant Inspector of Weights and Measures in Omaha and have been such for three years. We weighed loaves of bread that had been baked by Schultze Co., Burns Baking Co., Peterson & Pegau, and New England Bakeries. The last inspection and weighing, I think, was in September, 1921. We made tests in the different retail stores, but did not make any at the bakeries. All the bread was wrapped and most of it was under glass. In some places it was on the counter. We understood the bread had come in that morning,—it seemed fresh. The results of our tests are shown on Exhibits 3, 4 and 5. Since January we have weighed a few loaves. Last year we got a variation of maybe two ounces or an ounce and a half.

Cross-examination:

I do not know whether we got the loaves all at one store or in two stores. We knew nothing about the conditions under which the

bread was baked. We simply took the word of the dealer for that. We had no way of knowing when the dealer bought the bread. We did not cut open any of the loaves. I do not know how long a loaf of bread will remain fresh. We made no tests of temperature or humidity in any of the stores visited,—our only object was to weigh [fol. 114] the 15c. loaves being offered for sale by the dealers. We visited four or five stores. We usually got them in the large stores, the better class, that had a big supply of bread on hand. We did not pay any attention to the smaller dealers. The loaves of the different bakers varied in weight, as there was no fixed weight law and the loaves were not being sold as of any weight. We paid no attention to the quality of the bread.

GEORGE J. WEILER

Direct examination:

I am a baker in Lincoln at the Lett Baking Company. We have a dough mixer, but scale our dough by hand. We experimented to see whether we could bake a 1½ pound loaf which would not be less than 24 ounces nor more than 27 ounces, the results being shown on Exhibit 22. We scaled each piece of dough 28 ounces and baked 24 loaves. The greatest weight out of the oven was 26¼ ounces and the least 25 ounces. The bread was kept in a case in the bakery not where we ordinarily keep our bread and it was wrapped, and at the end of 24 hours the greatest weight of any of the loaves was 25¼ ounces and the least weight was 24¾ ounces. The case was a wooden one with glass doors with a few glass broken out for air circulation.

Cross-examination:

I just made one test. I did not pay any attention to the variation in the humidity of the air during the 24 hour period. Neither did I pay any attention to the temperature.

[fol. 115] Redirect examination:

We blended several flours to make the bread. I do not know what the mixture was, and I do not know what the blend was, whether it contained clear flours or whole wheat flours or not. The wooden case in which the bread was kept during the 24 hour period is in the dough room where the dough is mixed and prepared for the oven.

Recross-examination:

All our work is done in the same room. We make from 500 to 600 loaves a day. We are one of the smaller bakeries and our bread is sold over the counter, except we sell to one grocery store. We used a strong grade of flour but I do not know what the absorption was (B. 595-601).

ROBERT CORDELL

Direct examination:

The figures on Exhibit 26 correctly represent the result of tests made in the Lett Bakery, Lincoln, October 21, 1921, the loaves being wrapped all the time and there being no information concerning the temperature or humidity of the air.

EDWARD A. SMITH

Direct examination:

I am a lawyer and the author of the Smith Bread Bill. I have conversed with various bakers in Omaha and Lincoln. Made some tests. The bread after having been baked was kept on the counter in the places of business and it was wrapped.

[fol. 116] Cross-examination:

I am not a practical baker and was not present when Mr. Swoboda made the tests. I was there when he weighed the bread. It was a warm day. I don't know anything about the condition of the atmosphere or the oven. All I know is what Mr. Swoboda told me (B. 18-21).

VERNON G. ZEIMER

Direct examination:

I am State Scale Inspector for Nebraska. I was in Lett's Bakery last Friday when the baker scaled 32 loaves at 19 ounces. The regular loaves he was scaling he said were under that. I was there when the loaves were taken from the oven (B. 22). I was there a trifle over 24 hours afterward. When they finished weighing from the oven one day it was twenty minutes to one, and when I got there the next day it was a trifle after one, not more than half an hour. I saw the loaves weighed but I could not identify them as the same loaves that went into the oven. I had no mark on them. They were the same loaves that came out of the oven. He (the baker) told me they were the same but I have no way of telling. I made a chart of the loaves I weighed, that is I checked the weights. The sheets (Exhibit A) contain that record 24 hours after baking and 48 hours after baking in Exhibit B (B. 21-27).

Cross-examination:

The loaves had been wrapped but the wrappers were taken off at the 24 hour test (B. 27). I don't know where the loaves were nor [fol. 117] how long they had been wrapped. They said it was a waxed paper. I am not a practical baker and know nothing about conditions of oven or atmosphere. The day was an ordinary hot summer day. I did not see the loaves during the whole 24 hour period and identified them by a sticker which I had placed on them. I put my initials on the sticker but I found at the end of the 24 hours and at the end of the 48 hours it was almost obliterated. I don't know anything about the ingredients in the bread. I did not see the loaves put into the oven. I only saw the dough scaled. I

watched the baker weigh the loaves when they came out of the oven and he gave me figures which are down on Exhibits A and B. We did practically the same thing at the end of 24 hours. I don't know where the loaves were kept whether in a moist place or otherwise (B. 28-31).

HARLEY MERTZ

Direct examination:

I am a baker with Lett Baking Co., Lincoln, and was there July 22 and 23, 1921.

Mr. Smith, Mr. Zeimer and myself made some bread tests. I was present when the bread was scaled and when it came out of the oven and was weighed, and twenty-four hours afterwards, and some of it forty-eight hours afterwards when it was weighed. I put down some of the figures in the record kept, marked Exhibit A. I did the scaling and saw the weights of the bread put down. Mr. Smith made the figures in the first column, which is the weight of the bread when baked, and he also made the scaling figures. I scaled 19 ounces for [fol. 118] each loaf. I made the figures in Exhibit B and the figures in A and B correctly represent the result of our test. The capital letters F mean front of the oven, F C front center, B C back center, and B back aways.

Cross-examination:

The loaves were wrapped about two hours after being baked and were kept wrapped for the twenty-four hours in regular bread waxed paper. We made no experiments with the loaves unwrapped.

We did not test the air in the oven for the humidity, and I am just giving my opinion. After the loaves were baked they were kept in the same room with the ovens. In one test the bread was taken down town and put in a show case. No test was made of the air in the bakery during the twenty-four hour period. The dough used in making the bread was our regular formula. We made four experiments, and the sheets A and B represent two of the experiments. I think Mr. Smith has the other two. We mix dough by machinery. The dough was mixed about twenty minutes before it was put in the oven. We have no way of measuring the water put in the dough. The dough was prepared by some one else. No tests were made to find out the percentage of water in the dough and we have no means of knowing. It was a medium dough. Evaporation from dough depends upon the raising of the dough, or the proof before it is baked—that is, the expansion of the loaf in the pan which is determined by just looking at it.

Redirect examination:

We used just the ordinary dough in the Lett Bakery. In the other two tests the loaves were not weighed until two hours after [fol. 119] baking and that is why we did not keep any record of the test. I have been a baker seventeen years. I can come from one to two ounces in baking a loaf and think two ounces is a sufficient mar-

gin of tolerance, that is, two ounces to the pound. In a modern shop where flour and water are weighed and ingredients and fermentation are the same, the machine dividers of the dough should be very accurate. I am satisfied they will not vary over half an ounce if the fermentation is the same. They will hardly vary that much in a slack dough, but in a stiff dough there is a variance. The doughs are all a matter of regulation.

Recross-examination:

We made just four experiments and the greatest variation was two and one-half ounces to the pound. My opinion is based upon these four experiments. We did not go into the matter sufficiently to know whether there would be three or four, or more ounces of variation under different atmospheric conditions. I did that eight or nine years ago and found a big evaporation in normal conditions, practically the same as these tests. With an end loaf in the pan there is a big difference between the evaporation of the loaves in the back part of the oven, but after baking the evaporation won't vary over half an ounce. The longer the loaf is in the oven the greater is the evaporation, and the loaves first put in the oven remain there longer than those last put in, as the last loaves in are the first out. In an ordinary oven a man ought to fill at least one-half of the oven in from three to five minutes. The greatest variation we found was two and one-half ounces in the loaf within twenty-four hours after baking. There was not so much evaporation in the second twenty-[fol. 120] four hours. I have found that in using a dough divider, which is a machine, that the portions would vary half an ounce in weight. I did that seven or eight years ago when I worked in a large shop.

JOHN WHISTLER

Direct examination:

I am a baker with Sunlight Bakery, Lincoln. Have been a baker for twenty years. I made an experiment to see whether I could bake a loaf of bread which for twenty-four hours after baking would not be less than sixteen ounces in weight, nor more than eighteen ounces. Mr. Barr and Mr. Icham were present. I scaled and weighed the bread both times. Exhibit G contains the results of the tests. We used the ordinary run of dough and scaled it by hand. We have no dough dividers. After the bread came from the oven it was kept in the oven room, but I do not know what the atmospheric conditions were as compared with the outside. The room had a circulation all the time. The bread was not wrapped. None of the loaves exceeded eighteen ounces when they came from the oven. One fell below sixteen ounces. It only weighed sixteen ounces when it came from the oven and fifteen and one-half ounces at the end of twenty-four hours. The greatest weight of the loaves was seventeen and three-quarters ounces, and the greatest weight after twenty-four hours was seventeen ounces.

Cross-examination:

We made only one test and scaled the dough about seven o'clock Saturday morning, July 23, 1921. It may have been a sticky sultry and oppressive day. It kind of looked like rain any how. We made no tests to determine humidity—paid no attention to that, nor to the [fol. 121] atmospheric conditions. I don't know whether the air where the bread was kept was dry, humid or moist, as that would depend upon the atmospheric conditions outside, and the loaves were kept during that day in the open room where the outside air would reach them. There were thirty loaves. We used a medium sponge dough, but I don't know the quantity of water put in the dough as compared with the flour. We did not measure the water, only by the pails we used. We could not say accurately how many pounds of water went in. I never tested the flour to determine the moisture in it. The oven was 425 degrees. We never run the oven higher than 450. Some ovens run as high as 600. I don't think a loaf baked in a temperature of 600 degrees would evaporate more quickly than a loaf baked in 450 degrees. Our oven are heated by gas burners. The oven will cool off in a half hour and heat up in about the same time. We bake from 1,200 to 1,500 loaves a day, and 3,000 on Saturdays. Most of our bread is sold fresh over the counter, and we are classed as a retail baker. We run two doughs each day in the forenoon. The dough was of a thick consistency but it wasn't stiff. It would hold its shape; it wouldn't run around the pan. I call bread fresh for at least twelve hours after it comes out of the oven. We did not weigh the flour we put into the dough as we have no means of weighing, but sacks are supposed to contain ninety-eight pounds. We do not know the actual weight. We have no means of knowing the evaporation in the oven. It is a revolving oven and the loaves weren't in over thirty minutes. The heat of the oven may vary a few degrees. The loaves were thoroughly baked. It takes quite a while to mix the dough which is done by machinery. We do not time the [fol. 122] mixing of the dough, but judge it is mixed enough by its appearance without regard to the time. We determine by our eye when the dough is of the proper consistency to go into the oven. I do not know anything about the fermentation that takes place. The dough was mixed in the same room where it was baked. Temperature about eighty degrees and open to the outer air. Probably a little bit warmer inside than outside.

Redirect examination:

We used just ordinary methods and the loaves were baked under ordinary conditions. I can't account for one loaf falling below the others.

Affidavits

E. A. Smith, John A. Lett, Harley E. Mertz are all (except E. A. Smith, who is an attorney) practical bakers of some years' stand-

ing, and state that under the ordinary conditions in the ordinary bakery loaves of bread may be baked of any desired weight or with a tolerance of two ounces to the pound within the twenty-four hour period after baking.

[fol. 123] For Plaintiffs

STATE OF NEBRASKA,
County of Douglas, ss:

Peter O. L. Petersen and Joel T. Stewart, being each first duly sworn according to law, deposes and says that Peter O. L. Petersen is Superintendent of the manufacture of bread in the baking plant of Petersen & Pegau Baking Company at 12th and Jackson Streets, Omaha, Nebraska, and that Joel T. Stewart is foreman in such baking plant; that from July 20 to July 23, 1921, experiments were made by affiants in the baking of bread in said plant for the purpose of determining the varying evaporation of moisture from dough and bread in varying temperatures, and that the results of such experiments are set forth in the sheets attached hereto and made a part hereof, dated July 20, July 21 and July 22 and marked respectively numbers 1, 2 and 3; and that on numbers 1, 2 and 3, the first column refers to the test, the second column to the weight of the dough scaled before going into the oven, the third column to the time when the loaves were baked, the fourth column the weight of the loaves when taken from the oven, the fifth column to the weight of the loaves three hours after baking, the sixth column the weight of loaves twelve hours after baking, the seventh column the weight of loaves twenty-four hours after baking, the eight- column the total loss of weight thru the evaporation of moisture in the first twenty-four hours after baking, the ninth column to the position of the bread in the oven while baking, the tenth column the condition of the atmosphere where the bread was kept from the time of its baking to twenty-four hours afterwards; that the equipment and methods employed and used by affiants were the same equipment and methods regularly and daily used in Petersen & Pegau Baking Company plant in Omaha, and that the condition of the atmosphere in the rooms where the bread was kept during the twenty-four hour period was not different in any way from the atmospheric conditions prevailing at different times and different seasons throughout the State of Nebraska; that these experiments were made using the daily run of dough out of which bread is manufactured at this plant; that while, in the process of baking bread, and also for twenty-four hours after [fol. 124] baking, evaporation of moisture is taking place in varying degrees according to varying conditions, nevertheless the actual food value of the loaves remain- the same notwithstanding the evaporation of the moisture and the change in the weight of the loaves.

Peter O. L. Petersen. Joel T. Stewart.

Subscribed in my presence and sworn to before me this 23d day of July 1921. Deyo E. Crane, Notary Public. (Seal.)

[fol. 125]

PLAINTIFFS' EXHIBIT D TO PETERSEN ET AL. AFFIDAVIT

Experiments in Bread Baking at the Petersen & Pegau Baking Company Plant, 12th and Jackson Streets, Omaha, Nebraska, on Date July 20th, 1921

Sheet No. 1

1	2	3	4	5	6	7	8	9	10
Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf twelve hours after baking	Weight of loaf twenty-four hours after baking	Total loss of weight of loaf during twenty-four hour period after baking	Position of loaf in oven while baking	Condition of atmosphere where bread kept
1.....	20½ oz.	3:30 P. M.	19½ oz.	19½ oz.	19¼ oz.	18¾ oz.	1½ oz.	back.	moist.
2.....	20½ oz.	3:30 P. M.	18½ oz.	18 oz.	17½ oz.	17 oz.	1½ oz.	back.	moderate.
2.....	20½ oz.	3:30 P. M.	18¾ oz.	18¼ oz.	17½ oz.	16¾ oz.	2 oz.	back.	dry and warm.
4.....	20½ oz.	3:30 P. M.	18¾ oz.	18 oz.	17½ oz.	16¾ oz.	2 oz.	back.	dry and cool.
5.....	20½ oz.	3:30 P. M.	19 oz.	18¾ oz.	18½ oz.	17¾ oz.	1¼ oz.	middle.	moist.
6.....	20½ oz.	3:30 P. M.	18½ oz.	18 oz.	17¾ oz.	17¼ oz.	1¼ oz.	middle.	moderate.
7.....	20½ oz.	3:30 P. M.	19 oz.	18½ oz.	17¾ oz.	17 oz.	2 oz.	middle.	dry and warm.
8.....	20½ oz.	3:30 P. M.	19 oz.	18½ oz.	17¾ oz.	17 oz.	2 oz.	middle.	dry and cool
9.....	20½ oz.	3:30 P. M.	18½ oz.	18¼ oz.	18 oz.	17½ oz.	1 oz.	front.	moist.
10.....	20½ oz.	3:30 P. M.	19 oz.	18½ oz.	18 oz.	17½ oz.	1½ oz.	front.	moderate.
11.....	20½ oz.	3:30 P. M.	18½ oz.	17¾ oz.	16¾ oz.	16 oz.	2½ oz.	front.	dry and warm.
12.....	20½ oz.	3:30 P. M.	18¾ oz.	18¼ oz.	17¾ oz.	16¾ oz.	2 oz.	front.	dry and cool.

[fol. 126] PLAINTIFFS' EXHIBIT E TO PETERSEN ET AL. AFFIDAVIT

Experiments in Bread Baking at the Petersen & Pegau Baking Company Plant, 12th and Jackson Streets, Omaha, Nebraska, on Date July 21, 1921

Sheet No. 2

1	2	3	4	5	6	7	8	9	10
Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf twelve hours after baking	Weight of loaf twenty-four hours after baking	Total loss of weight of loaf during twenty-four hour period after baking	Position of loaf in oven while baking	Condition of atmosphere where bread kept
1.....	20½ oz.	3:30 P. M.	18½ oz.	18¼ oz.	17½ oz.	17¼ oz.	1¼ oz.	back.	moist.
2.....	20½ oz.	3:30 P. M.	19 oz.	18¼ oz.	18 oz.	17¾ oz.	1¼ oz.	back.	moderate.
3.....	20½ oz.	3:30 P. M.	18½ oz.	17½ oz.	16 oz.	14½ oz.	4 oz.	back.	dry and warm.
4.....	20½ oz.	3:30 P. M.	18½ oz.	17¾ oz.	16¾ oz.	16¼ oz.	2¼ oz.	back.	dry and cool.
5.....	20½ oz.	3:30 P. M.	18¾ oz.	18½ oz.	17¾ oz.	17 oz.	1¾ oz.	middle.	moist.
6.....	20½ oz.	3:30 P. M.	18 oz.	17½ oz.	17¼ oz.	17 oz.	1 oz.	middle.	moderate.
7.....	20½ oz.	3:30 P. M.	18¾ oz.	17½ oz.	16 oz.	14½ oz.	4¼ oz.	middle.	dry and warm.
8.....	20½ oz.	3:30 P. M.	18½ oz.	17¾ oz.	16¾ oz.	16½ oz.	2 oz.	middle.	dry and cool.
9.....	20½ oz.	3:30 P. M.	18¾ oz.	18½ oz.	17½ oz.	17½ oz.	1¼ oz.	front.	moist.
10.....	20½ oz.	3:30 P. M.	18¾ oz.	18 oz.	17¾ oz.	17½ oz.	1¼ oz.	front.	moderate.
11.....	20½ oz.	3:30 P. M.	18½ oz.	17½ oz.	16½ oz.	14½ oz.	4 oz.	front.	dry and warm.
12.....	20½ oz.	3:30 P. M.	18¾ oz.	18 oz.	17¼ oz.	16¾ oz.	2 oz.	front.	dry and cool.

Experiments in Bread Baking at the Petersen & Pegau Baking Company Plant, 12th and Jackson Streets, Omaha, Nebraska, on Date July 22nd, 1921

Sheet No. 3

1	2	3	4	5	6	7	8	9	10
Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf twelve hours after baking	Weight of loaf twenty-four hours after baking	Total loss of weight of loaf during twenty-four hour period after baking	Position of loaf in oven while baking	Condition of atmosphere where bread kept
1.....	20 oz.	3:30 P. M.	17 oz.	17 oz.	16¾ oz.	16¾ oz.	¼ oz.	back.	moist.
2.....	20 oz.	3:30 P. M.	17½ oz.	16¾ oz.	16½ oz.	16½ oz.	1 oz.	back.	moderate.
3.....	20 oz.	3:30 P. M.	17½ oz.	16¾ oz.	15 oz.	14¼ oz.	3¼ oz.	back.	dry and warm.
4.....	20 oz.	3:30 P. M.	17½ oz.	16½ oz.	15¾ oz.	15½ oz.	2 oz.	back.	dry and cool.
5.....	20 oz.	3:30 P. M.	17¼ oz.	17 oz.	16¾ oz.	16¾ oz.	½ oz.	middle.	moist.
6.....	20 oz.	3:30 P. M.	17½ oz.	17¼ oz.	16¾ oz.	16¾ oz.	¾ oz.	middle.	moderate.
7.....	20 oz.	3:30 P. M.	18 oz.	16¾ oz.	15 oz.	14¼ oz.	3¾ oz.	middle.	dry and warm.
8.....	20 oz.	3:30 P. M.	17½ oz.	16½ oz.	15¾ oz.	15¾ oz.	1¼ oz.	middle.	dry and cool.
9.....	20 oz.	3:30 P. M.	17¼ oz.	17¼ oz.	17¼ oz.	17 oz.	¼ oz.	front.	moist.
10.....	20 oz.	3:30 P. M.	17½ oz.	17¼ oz.	16¾ oz.	16¾ oz.	¾ oz.	front.	moderate.
11.....	20 oz.	3:30 P. M.	18 oz.	16¾ oz.	15 oz.	14½ oz.	3½ oz.	front.	dry and warm.
12.....	20 oz.	3:30 P. M.	18 oz.	16½ oz.	15¾ oz.	15½ oz.	2½ oz.	front.	dry and cool.

EVIDENCE: PLAINTIFFS' EXHIBIT 6–1

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	21	19.50	16.37	90°	91°	45°	48°	3.13
2	21	19.63	16.12	90	91	45	48	3.51
3	21	19.37	15.25	90	91	45	48	4.12
4	21	19.37	15.25	90	91	45	48	4.12
5	21	19.50	15.75	90	91	45	48	3.75
6	21	19.25	15.50	90	91	45	48	3.75
Averages	21	19.44	15.71	90	91	45	48	3.73
7	21	19.50	15.75	87	90	46	58	3.75
8	21	19.50	16.25	87	90	46	58	3.25
9	21	19.50	16.00	87	90	46	58	3.50
10	21	19.62	16.25	87	90	46	58	3.37
11	21	19.50	16.50	87	90	46	58	3.00
12	21	19.50	16.62	87	90	46	58	2.88
Averages	21	19.52	16.23	87	90	46	58	3.29

13	12	9.50	8.50	90	91	45	48	1.00
14	12	9.50	8.50	90	91	45	48	1.00
15	12	9.37	8.62	90	91	45	48	.75
16	12	9.50	8.87	90	91	45	48	.63
17	12	9.37	8.50	90	91	45	48	.87
Averages	12	9.45	8.60	90	91	45	48	.85
18	12	9.37	8.75	87	90	46	58	.62
19	12	9.75	8.75	87	90	46	58	1.00
20	12	9.50	8.75	87	90	46	58	.75
21	12	9.50	9.00	87	90	46	58	.50
22	12	9.62	8.75	87	90	46	58	.87
Averages	12	9.55	8.80	87	90	46	58	.75

P. O. L. P. J. G. S. M. P.

Sheet Number, —. Baking Date, Sept. 20, 1921. Baking Time, 2:00 p. m.

[fol. 129]

EVIDENCE: PLAINTIFFS' EXHIBIT 6–2

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.50	14.87	91°	86°	48°	56°	2.63
2	20	17.75	15.25	91	86	48	56	2.50
3	20	17.50	15.50	91	86	48	56	2.00
4	20	17.75	15.00	91	86	48	56	2.75
5	20	18.00	14.75	91	86	48	56	3.25
6	20	18.00	14.75	91	86	48	56	3.25
Averages	20	17.75	15.02	91	86	48	56	2.73
7	20	17.75	16.00	90	82	58	84	1.75
8	20	18.00	15.75	90	82	58	84	2.25
9	20	17.25	15.62	90	82	58	84	1.63
10	20	18.00	15.75	90	82	58	84	2.25
11	20	18.00	15.50	90	82	58	84	2.50
12	20	18.00	15.62	90	82	58	84	2.38
Averages	20	17.83	15.70	90	82	58	84	2.13

13	12	10.50	8.25	91	86	48	56	2.25
14	12	10.50	8.75	91	86	48	56	1.75
15	12	10.50	8.75	91	86	48	56	1.75
16	12	10.50	8.75	91	86	48	56	1.75
17	12	10.50	8.50	91	86	48	56	2.00
Averages	12	10.50	8.60	91	86	48	56	1.90
18	12	10.25	8.87	90	82	58	84	1.38
19	12	10.50	8.75	90	82	58	84	1.75
20	12	10.50	9.00	90	82	58	84	1.50
21	12	10.37	9.00	90	82	58	84	1.37
22	12	10.25	9.00	90	82	58	84	1.25
Averages	12	10.37	8.92	90	82	58	84	1.45

Sheet Number, —. Baking Date, Sept. 21, 1921. Baking Time, 2:00 p. m.

[fol. 130]

EVIDENCE: PLAINTIFFS' EXHIBIT 6–3

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.75	15.25	87°	85°	60°	68°	2.50
2	20	17.12	14.75	87	85	60	68	2.37
3	20	17.37	15.00	87	85	60	68	2.37
4	20	17.12	14.75	87	85	60	68	2.37
5	20	18.00	15.50	87	85	60	68	2.50
6	20	17.25	14.87	87	85	60	68	2.38
Averages	20	17.43	15.02	87	85	60	68	2.41
7	20	18.00	16.00	82	82	70	84	2.00
8	20	17.25	15.50	82	82	70	84	1.75
9	20	17.50	15.62	82	82	70	84	1.88
10	20	17.25	15.50	82	82	70	84	1.75
11	20	18.00	15.25	82	82	70	84	2.75
12	20	17.50	15.50	82	82	70	84	2.00
Averages	20	17.58	15.56	82	82	70	84	2.02

13	11	9.75	8.50	87	85	60	68	1.25
14	11	8.87	7.50	87	85	60	68	1.37
15	11	8.87	7.62	87	85	60	68	1.25
16	11	8.75	7.75	87	85	60	68	1.00
17	11	9.12	7.75	87	85	60	68	1.37
Averages	11	9.07	7.82	87	85	60	68	1.25
18	11	9.62	9.25	82	82	70	84	.37
19	11	9.25	8.50	82	82	70	84	.75
20	11	9.37	8.50	82	82	70	84	.87
21	11	8.50	8.00	82	82	70	84	.50
22	11	9.00	8.00	82	82	70	84	1.00
Averages	11	9.15	8.45	82	82	70	84	.70

Sheet Number, —. Baking Date, Sept. 23, 1921. Baking Time, 2:00 p. m.

[fol. 131] EVIDENCE: PLAINTIFFS' EXHIBIT 6-4

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	18.50	16.50	88°	92°	43°	60°	2.00
2	20	18.50	16.00	88	92	43	60	2.50
3	20	19.00	17.00	88	92	43	60	2.00
4	20	18.50	16.50	88	92	43	60	2.00
5	20	18.25	16.00	88	92	43	60	2.25
6	20	18.25	16.00	88	92	43	60	2.25
Averages	20	18.50	16.33	88	92	43	60	2.17
7	20	18.50	17.00	78	80	50	72	1.50
8	20	18.50	17.00	78	80	50	72	1.50
9	20	18.75	17.50	78	80	50	72	1.25
10	20	18.50	17.00	78	80	50	72	1.50
11	20	18.62	17.00	78	80	50	72	1.62
12	20	18.25	17.00	78	80	50	72	1.25
Averages	20	18.52	17.08	78	80	50	72	1.44

13	11	9.50	8.75	88	92	43	60	.75
14	11	9.50	8.50	88	92	43	60	1.00
15	11	9.50	8.50	88	92	43	60	1.00
16	11	9.50	8.75	88	92	43	60	.75
17	11	10.50	9.00	88	92	43	60	1.50
Averages	11	9.70	8.70	88	92	43	60	1.00
18	11	9.75	8.50	78	80	50	72	1.25
19	11	10.00	8.50	78	80	50	72	1.50
20	11	9.75	8.00	78	80	50	72	1.75
21	11	9.50	8.50	78	80	50	72	1.00
22	11	9.50	8.00	78	80	50	72	1.50
Averages	11	9.70	8.30	78	80	50	72	1.40

Sheet Number, —. Baking Date, Sept. 25, 1921. Baking Time, 2:00 p. m.

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	18.00	16.00	88°	94°	40°	55°	2.00
2	20	17.50	15.00	88	94	40	55	2.50
3	20	17.50	16.00	88	94	40	55	1.50
4	20	18.75	16.00	88	94	40	55	2.75
5	20	18.00	16.00	88	94	40	55	2.00
6	20	17.50	15.50	88	94	40	55	2.00
Averages	20	17.87	15.75	88	94	40	55	2.12
7	20	17.50	16.50	82	85	56	68	1.00
8	20	18.00	16.50	82	85	56	68	1.50
9	20	18.00	16.50	82	85	56	68	1.50
10	20	18.25	17.00	82	85	56	68	1.25
11	20	17.50	16.00	82	85	56	68	1.50
12	20	18.00	16.75	82	85	56	68	1.25
Averages	20	17.87	16.54	82	85	56	68	1.33

13	11	9.50	8.75	88	94	40	55	.75
14	11	10.00	8.75	88	94	40	55	1.25
15	11	9.50	8.25	88	94	40	55	1.25
16	11	9.50	8.25	88	94	40	55	1.25
17	11	10.00	8.50	88	94	40	55	1.50
Averages	11	9.70	8.50	88	94	40	55	1.20
18	11	9.50	8.75	82	85	56	68	.75
19	11	9.25	8.50	82	85	56	68	.75
20	11	9.50	8.50	82	85	56	68	1.00
21	11	10.00	9.00	82	85	56	68	1.00
22	11	9.25	8.50	82	85	56	68	.75
Averages	11	9.50	8.65	82	85	56	68	.85

Sheet Number, —. Baking Date, Sept. 27, 1921. Baking Time, 2:00 p. m.

[fol. 133] EVIDENCE: PLAINTIFFS' EXHIBIT 6–6

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	18.00	16.00	94°	88°	55°	45°	2.00
2	20	19.00	16.50	94	88	55	45	2.50
3	20	18.25	16.00	94	88	55	45	2.25
4	20	18.50	16.50	94	88	55	45	2.00
5	20	18.00	16.00	94	88	55	45	2.00
6	20	17.50	15.25	94	88	55	45	2.25
Averages	20	18.21	16.04	94	88	55	45	2.17
7	20	18.00	16.00	85	75	68	51	2.00
8	20	18.00	16.00	85	75	68	51	2.00
9	20	17.50	16.25	85	75	68	51	1.25
10	20	18.00	16.50	85	75	68	51	1.50
11	20	18.25	16.50	85	75	68	51	1.75
12	20	18.00	16.50	85	75	68	51	1.50
Averages	20	17.96	16.29	85	75	68	51	1.67

13	11	8.50	7.50	94	88	55	45	1.00
14	11	9.00	7.50	94	88	55	45	1.50
15	11	8.50	7.25	94	88	55	45	1.25
16	11	8.75	7.25	94	88	55	45	1.50
17	11	8.50	7.75	94	88	55	45	.75
Averages	11	8.65	7.45	94	88	55	45	1.20
18	11	9.00	8.00	85	75	68	51	1.00
19	11	8.75	7.50	85	75	68	51	1.25
20	11	8.50	7.50	85	75	68	51	1.00
21	11	9.00	8.00	85	75	68	51	1.00
22	11	8.50	7.50	85	75	68	51	1.00
Averages	11	8.75	7.70	85	75	68	51	1.05

Sheet Number, —. Baking Date, Sept. 28, 1921. Baking Time, 2:00 p. m.

EVIDENCE: PLAINTIFFS' EXHIBIT 6-7

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand)	Baked weight when taken from oven	Weight 24 hours after baking	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking
	(Ounces)	(Ounces)	(Ounces)					(Ounces)
1	20	18.00	15.75	88°	92°	45°	41°	....
2	20	18.50	16.00	88	92	45	41	2.00
3	20	17.50	15.50	88	92	45	41	2.00
4	20	18.00	15.50	88	92	45	41	2.50
5	20	18.00	16.50	88	92	45	41	1.50
6	20	17.75	15.00	88	92	45	41	2.75
Averages	20	17.96	15.71	88	92	45	41	2.25
7	20	17.50	16.00	75	78	51	40	1.50
8	20	18.00	16.25	75	78	51	40	1.75
9	20	18.00	16.50	75	78	51	40	1.50
10	20	18.00	15.50	75	78	51	40	2.50
11	20	18.00	16.00	75	78	51	40	2.00
12	20	18.00	16.25	75	78	51	40	1.75
Averages	20	17.91	16.08	75	78	51	40	1.83

13	11	8.75	7.25	88	92	45	41	1.50
14	11	8.75	7.25	88	92	45	41	1.50
15	11	8.75	7.50	88	92	45	41	1.25
16	11	8.50	7.50	88	92	45	41	1.00
17	11	8.50	7.25	88	92	45	41	1.25
Averages	11	8.65	7.35	88	92	45	41	1.30
18	11	8.50	7.25	75	78	51	40	1.25
19	11	8.50	7.25	75	78	51	40	1.25
20	11	9.50	7.50	75	78	51	40	2.00
21	11	8.75	7.25	75	78	51	40	1.50
22	11	8.50	7.50	75	78	51	40	1.00
Averages	11	8.75	7.35	75	78	51	40	1.40

Sheet Number, —. Baking Date, Sept. 29, 1921. Baking Time, 2:00 p. m.

[fol. 135] EVIDENCE: PLAINTIFFS' EXHIBIT 6–8

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.75	15.25	92°	86°	41°	56°	2.50
2	20	18.00	15.25	92	86	41	56	2.75
3	20	18.00	15.25	92	86	41	56	2.75
4	20	18.00	15.25	92	86	41	56	2.75
5	20	18.00	15.50	92	86	41	56	2.50
6	20	18.00	15.25	92	86	41	56	2.75
Averages	20	17.96	15.29	92	86	41	56	2.67
7	20	17.75	15.50	78	77	40	51	2.25
8	20	18.00	15.50	78	77	40	51	2.50
9	20	18.00	15.62	78	77	40	51	2.38
10	20	17.50	15.37	78	77	40	51	2.13
11	20	17.50	15.50	78	77	40	51	2.00
12	20	17.50	15.25	78	77	40	51	2.25
Averages	20	17.71	15.46	78	77	40	51	2.25

13	11	8.50	7.00	92	86	41	56	1.50
14	11	8.50	7.00	92	86	41	56	1.50
15	11	8.50	7.00	92	86	41	56	1.50
16	11	8.25	6.75	92	86	41	56	1.50
17	11	9.00	7.50	92	86	41	56	1.50
Averages	11	8.55	7.05	92	86	41	56	1.50
18	11	9.00	8.50	78	86	40	51	.50
19	11	8.50	7.25	78	86	40	51	1.25
20	11	8.25	7.00	78	86	40	51	1.25
21	11	8.50	6.75	78	86	40	51	1.75
22	11	8.75	7.50	78	86	40	51	1.25
Averages	11	8.60	7.40	78	86	40	51	1.20

Sheet Number, —. Baking Date, Sept. 30, 1921. Baking Time, 2:00 p. m.

[fol. 136] EVIDENCE: PLAINTIFFS' EXHIBIT 6-9

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.50	15.50	90°	88°	43°	46°	2.00
2	20	16.75	15.50	90	88	43	46	1.25
3	20	17.50	14.75	90	88	43	46	2.75
4	20	18.00	15.50	90	88	43	46	2.50
5	20	17.50	15.75	90	88	43	46	1.75
6	20	18.25	15.25	90	88	43	46	3.00
Averages	20	17.58	15.37	90	88	43	41	2.21
7	20	18.25	16.00	74	74	43	43	2.25
8	20	18.00	16.00	74	74	43	43	2.00
9	20	17.25	15.25	74	74	43	43	2.00
10	20	17.25	15.50	74	74	43	43	1.75
11	20	17.25	15.50	74	74	43	43	1.75
12	20	17.50	15.75	74	74	43	43	1.75
Averages	20	17.58	15.66	74	74	43	43	1.92

13	11	9.00	7.50	90	88	43	46	1.50
14	11	9.00	7.00	90	88	43	46	2.00
15	11	8.50	7.50	90	88	43	46	1.00
16	11	8.50	7.00	90	88	43	46	1.50
17	11	8.50	7.25	90	88	43	46	1.25
Averages	11	8.70	7.25	90	88	43	46	1.45
18	11	8.50	7.00	74	74	43	43	1.50
19	11	8.50	7.00	74	74	43	43	1.50
20	11	8.50	7.25	74	74	43	43	1.25
21	11	8.50	7.00	74	74	43	43	1.50
22	11	8.50	7.00	74	74	43	43	1.50
Averages	11	8.50	7.05	74	74	43	43	1.45

Sheet Number, —. Baking Date, Oct. 2, 1921. Baking Time, 2:00 p. m.

[fol. 137]

EVIDENCE: PLAINTIFFS' EXHIBIT 6–10

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand)	Baked weight when taken from oven	Weight 24 hours after baking	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking
	(Ounces)	(Ounces)	(Ounces)					(Ounces)
1	20	17.00	14.50	88°	90°	46°	43°	2.50
2	20	16.75	14.37	88	90	46	43	2.38
3	20	17.00	14.50	88	90	46	43	2.50
4	20	17.00	14.75	88	90	46	43	2.25
5	20	17.50	15.00	88	90	46	43	2.50
6	20	17.50	15.00	88	90	46	43	2.50
Averages	20	17.13	14.69	88	90	46	43	2.44
7	20	17.50	15.50	74	77	43	42	2.00
8	20	17.75	16.00	74	77	43	42	1.75
9	20	17.00	15.25	74	77	43	42	1.75
10	20	16.75	15.25	74	77	43	42	1.50
11	20	17.25	15.50	74	77	43	42	1.75
12	20	16.75	15.00	74	77	43	42	1.75
Averages	20	17.17	15.42	74	77	43	42	1.75

13	11	8.75	7.75	88	90	46	43	1.00
14	11	8.25	7.50	88	90	46	43	.75
15	11	8.50	7.50	88	90	46	43	1.00
16	11	7.75	7.00	88	90	46	43	.75
17	11	8.25	7.12	88	90	46	43	1.13
Averages	11	8.30	7.37	88	90	46	43	.93
18	11	8.50	7.25	74	77	43	42	1.25
19	11	8.25	7.25	74	77	43	42	1.00
20	11	8.00	7.75	74	77	43	42	1.25
21	11	8.75	8.25	74	77	43	42	.50
22	11	8.75	7.62	74	77	43	42	1.13
Averages	11	8.45	7.42	74	77	43	42	1.03

Sheet Number, —. Baking Date, Oct. 3, 1921. Baking Time, 2:00 p. m.

[fol. 138] EVIDENCE: PLAINTIFFS' EXHIBIT 6–11

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	16.50	14.50	90°	90°	43°	45°	2.00
2	20	16.25	14.25	90	90	43	45	2.00
3	20	16.25	14.25	90	90	43	45	2.00
4	20	16.75	14.25	90	90	43	45	2.50
5	20	16.50	14.00	90	90	43	45	2.50
6	20	17.25	14.25	90	90	43	45	3.00
Averages	20	16.58	14.25	90	90	43	45	2.33
7	20	16.75	15.00	77	76	42	50	1.75
8	20	16.50	14.50	77	76	42	50	2.00
9	20	16.50	15.00	77	76	42	50	1.50
10	20	17.25	15.25	77	76	42	50	2.00
11	20	17.00	15.00	77	76	42	50	2.00
12	20	16.75	14.50	77	76	42	50	2.25
Averages	20	16.79	14.87	77	76	42	50	1.92

14	11	8.25	7.25	90	90	43	45	1.00
15	11	8.25	7.25	90	90	43	45	1.00
16	11	8.00	7.00	90	90	43	45	1.00
17	11	8.25	7.00	90	90	43	45	1.25
Averages	11	8.20	7.10	90	90	43	45	1.10
18	11	8.25	7.50	77	76	42	50	.75
19	11	8.25	7.50	77	76	42	50	.75
20	11	8.25	7.50	77	76	42	50	.75
21	11	8.50	7.75	77	76	42	50	.75
22	11	8.25	7.50	77	76	42	50	.75
Averages	11	8.30	7.55	77	76	42	50	.75

Sheet Number, —. Baking Date, Oct. 4, 1921. Baking Time, 2:00 p. m.

[fol. 139] EVIDENCE: PLAINTIFFS' EXHIBIT 6–12

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.50	14.37	90°	93°	45°	45°	3.13
2	20	18.00	16.25	90	93	45	45	1.75
3	20	17.75	15.00	90	93	45	45	2.75
4	20	17.50	14.75	90	93	45	45	2.75
5	20	17.50	14.75	90	93	45	45	2.75
6	20	17.50	14.75	90	93	45	45	2.75
Averages	20	17.62	14.98	90	93	45	45	2.64
7	20	17.50	14.75	76	80	50	44	2.75
8	20	17.75	15.50	76	80	50	44	2.25
9	20	18.00	15.25	76	80	50	44	2.75
10	20	18.50	16.50	76	80	50	44	2.00
11	20	17.75	15.50	76	80	50	44	2.25
12	20	17.75	16.25	76	80	50	44	1.50
Averages	20	17.87	15.62	76	80	50	44	2.25

14	11	8.50	7.25	90	93	45	45	1.25
15	11	8.75	7.50	90	93	45	45	1.25
16	11	9.25	8.25	90	93	45	45	1.00
17	11	8.50	7.00	90	93	45	45	1.50
Averages	11	8.70	7.45	90	93	45	45	1.25
18	11	8.50	7.25	76	80	50	44	1.25
19	11	8.25	7.75	76	80	50	44	.50
20	11	9.00	8.00	76	80	50	44	1.00
21	11	8.00	7.50	76	80	50	44	.50
22	11	9.50	8.25	76	80	50	44	1.25
Averages	11	8.65	7.75	76	80	50	44	.90

Sheet Number, —. Baking Date, Oct. 5, 1921. Baking Time, 2:00 p. m.

[fol. 140] EVIDENCE: PLAINTIFFS' EXHIBIT 6–13

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.25	14.50	93°	88°	45°	38°	2.75
2	20	17.50	15.00	93	88	45	38	2.50
3	20	17.25	14.25	93	88	45	38	3.00
4	20	17.50	14.50	93	88	45	38	3.00
5	20	17.50	14.75	93	88	45	38	2.75
6	20	16.75	13.50	90	88	45	38	3.25
Averages	20	17.29	14.42	93	88	45	38	2.87
7	20	17.25	15.25	80	65	44	40	2.00
8	20	17.25	15.50	80	65	44	40	1.75
9	20	17.00	15.00	80	65	44	40	2.00
10	20	16.75	15.00	80	65	44	40	1.75
11	20	17.00	15.00	80	65	44	40	2.00
12	20	16.75	15.25	80	65	44	40	1.50
Averages	20	17.00	15.17	80	65	44	40	1.83

13	11	8.75	7.50	93	88	45	38	1.25
14	11	8.00	6.50	90	88	45	38	1.50
15	11	7.75	7.00	90	88	45	38	.75
16	11	8.00	7.00	93	88	45	38	1.00
17	11	8.00	6.50	93	88	45	38	1.50
Averages	11	8.10	6.90	93	88	45	38	1.20
18	11	8.00	7.25	80	65	44	40	.75
19	11	8.50	7.75	80	65	44	40	.75
20	11	8.50	7.75	80	65	44	40	.75
21	11	7.75	7.00	80	65	44	40	.75
22	11	7.75	7.25	80	65	44	40	.50
Averages	11	8.10	7.40	80	65	44	40	.70

Sheet Number, —. Baking Date, Oct. 6, 1921. Baking Time, 2:00 p. m.

[fol.141] EVIDENCE: PLAINTIFFS' EXHIBIT 6–14

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	16.75	13.75	95°	88°	33°	34°	3.00
2	20	17.25	14.00	95	88	33	34	3.25
3	20	17.00	14.25	95	88	33	34	2.75
4	20	17.25	14.75	95	88	33	34	2.50
5	20	18.00	15.25	95	88	33	34	2.75
6	20	17.00	14.50	95	88	33	34	2.50
Averages	20	17.21	14.42	95	88	33	34	2.79
7	20	17.25	15.00	95	88	33	34	2.25
8	20	17.75	15.50	95	88	33	34	2.25
9	20	17.50	14.50	95	88	33	34	3.00
10	20	16.25	14.00	95	88	33	34	2.25
11	20	17.25	14.25	95	88	33	34	3.00
12	20	17.00	14.50	95	88	33	34	2.50
Averages	20	17.17	14.63	95	88	33	34	2.54

13	11	8.00	6.50	95	88	33	34	1.50
14	11	8.00	6.50	95	88	33	34	1.50
15	11	7.75	6.75	95	88	33	34	1.00
16	11	7.75	6.50	95	88	33	34	1.25
17	11	8.00	6.50	95	88	33	34	1.50
Averages	11	7.90	6.55	95	88	33	34	1.35
18	11	8.00	6.75	95	88	33	34	1.25
19	11	8.00	6.75	95	88	33	34	1.25
20	11	8.00	6.75	95	88	33	34	1.25
21	11	8.25	6.50	95	88	33	34	1.75
22	11	8.00	6.50	95	88	33	34	1.50
Averages	11	8.05	6.65	95	88	33	34	1.40

Sheet Number, —. Baking Date, Oct. 10, 1921. Baking Time, 2:00 p. m.

[fol. 142]

EVIDENCE: PLAINTIFFS' EXHIBIT 6–'5

Minor S. Bacon, Reporter

For Plaintiffs

Loaf number	Scaled weight (scaled by hand) (Ounces)	Baked weight when taken from oven (Ounces)	Weight 24 hours after baking (Ounces)	Temperature where kept for 24 hours, taken day of baking	Temperature where kept for 24 hours, taken day after baking	Humidity where kept for 24 hours, taken day of baking	Humidity where kept for 24 hours, taken day after baking	Total variation during first 24 hours after baking (Ounces)
1	20	17.25	15.00	88°	100°	34°	30°	2.25
2	20	17.50	15.00	88	100	34	30	2.50
3	20	17.00	14.25	88	100	34	30	2.75
4	20	18.25	15.50	88	100	34	30	2.75
5	20	17.25	14.75	88	100	34	30	2.50
6	20	18.00	15.75	88	100	34	30	2.25
Averages	20	17.54	15.04	88	100	34	30	2.50
7	20	17.50	15.00	88	100	34	30	2.50
8	20	17.50	15.00	88	100	34	30	2.50
9	20	17.50	14.75	88	100	34	30	2.75
10	20	17.50	14.75	88	100	34	30	2.75
11	20	17.50	14.25	88	100	34	30	3.25
12	20	17.25	14.50	88	100	34	30	2.75
Averages	20	17.46	14.71	88	100	34	30	2.75

13	11	8.00	6.75	88	100	34	30	
14	11	8.00	6.50	88	100	34	30	1.25
15	11	8.00	6.50	88	100	34	30	1.50
16	11	7.75	6.50	88	100	34	30	1.50
17	11	8.00	7.00	88	100	34	30	1.25
Averages	11	7.95	6.65	88	100	34	30	1.00
								1.30
18	11	8.00	6.50	88	100	34	30	
19	11	8.00	6.50	88	100	34	30	1.50
20	11	8.25	6.75	88	100	34	30	1.50
21	11	8.00	6.50	88	100	34	30	1.50
22	11	8.00	6.75	88	100	34	30	1.50
Averages	11	8.05	6.60	88	100	34	30	1.25
								1.45

Sheet Number, —. Baking Date, Oct. 11, 1921. Baking Time, 2:00 p. m.

[fol. 143] For Plaintiffs

STATE OF NEBRASKA,
County of Douglas, ss:

George F. Wilberg, being first duly sworn according to law, deposes and says that he has been a practical baker for twenty-five years; that at the present time he is the proprietor of a retail bread baking business at 1829 North 24th Street in Omaha, Nebraska; that he is conversant with the conditions surrounding the manufacture of bread by retail bakers; that on July 21, 1921 experiments were made by affiant in the baking of bread in his bakery for the purpose of determining the varying evaporation of moisture from dough and bread, and that the results of such experiments are set forth in the sheet attached hereto and made a part hereof; that the first column refers to the test, the second column to the weight of the dough scaled before going into the oven, the third column to the time when the loaves were baked, the fourth column to the weight of the loaves when taken from the oven, the fifth column to the weight of the loaves three hours after baking, the sixth column to the weight of the loaves six hours after baking, the seventh column to the weight of the loaves twelve hours after baking, the eighth column to the total loss of weight thru the evaporation of moisture in the first twelve hour period after baking, the ninth column to the position of the bread in the oven while baking; and the tenth column to the condition of the atmosphere where the loaves were kept, that while, evaporation of moisture took place in the varying degrees during the twelve hour period after baking, nevertheless the actual food value of the loaves remain the same as at the time of baking, notwithstanding the change in the weight of the loaves.

(Signed) George W. Wilberg.

Subscribed in my presence and sworn to before me this 23rd day of July, 1921. Deyo E. Crane, Notary Public. (Seal.)

Plaintiffs' Exhibit K-½

[fol. 144]

PLAINTIFFS' EXHIBIT K-½ TO WILBERG'S AFFIDAVIT

Experiments in Bread Baking at the George F. Wilberg Bakery, 1829 North 12th Street, Omaha, Nebraska, on Date July 21st, 1921

1	2	3	4	5	6	7	8	9	10
Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf six hours after baking	Weight of loaf twelve hours after baking	Total loss of weight of loaf during twelve hour period after baking	Position of loaf in oven while baking	Condition of atmosphere where bread kept
1.....	20½ oz.	11 A. M.	19½ oz.	19½ oz.	18½ oz.	17½ oz.	2 oz.	back.	moderate.
2.....	20½ oz.	11 A. M.	19½ oz.	18 oz.	18 oz.	17½ oz.	1¾ oz.	center.	moderate.
3.....	20½ oz.	11 A. M.	18¾ oz.	18¾ oz.	18 oz.	17¼ oz.	1½ oz.	front.	moderate.

[fol. 145] EVIDENCE: PLAINTIFFS' EXHIBIT P-1

For Plaintiffs

8940

STATE OF NEBRASKA,
County of Douglas, ss:

C. S. Jarnagin, Frank Walden and N. R. Mount, being each first duly sworn according to law, deposes and says that C. S. Jarnagin is Superintendent of the manufacture of bread in the baking plant of the Jay Burns Baking Company at 20th and Cuming Streets, Omaha, Nebraska, and that Frank Walden and N. R. Mount are foremen in such baking plant; that from June 28 to July 4, 1921, experiments were made by affiants in the baking of bread in said plant for the purpose of determining the varying evaporation of moisture from dough and bread in varying temperatures and that the results of such experiments are set forth in the sheets attached hereto and made a part hereof, dated June 28, June 29, July 4, July 1 and July 3, and marked respectively numbers 7, 8, 9, 10 and 11; that on numbers 7, 8 and 9, the first column refers to the test, the second column to the weight of the doug- scaled before going into the oven, the third column to the time when the loaves were baked, the fourth column the weight of the loaves when taken from the oven, the fifth column to the weight of the loaves three hours after baking, the sixth column the weight of loaves eight hours after baking, the seventh column the weight of loaves sixteen hours after baking, the eighth column the weight of loaves twenty-four hours after baking, and the ninth column the condition of the atmosphere where the bread was kept from the time of its baking to twenty-four hours afterwards; that on sheets numbered respectively 10 and 11 are shown the results of bread baked at different times during the day when the ovens were at different temperatures and at different locations in the same ovens; that on sheets marked 10 and 11 are shown the results, first, of bread baked in a hot oven, marked No. 1; second, in a medium oven, marked No. 2, and third, in a cool oven, [fol. 146] marked No. 3; and also showing the location of the bread in the ovens when being baked, and likewise showing the condition of the atmosphere in the rooms where the bread was kept during the twenty-four hour period after baking; that the equipment and methods employed and used by affiants when making the experiments were the same equipment and methods regularly and daily used in the Jay Burns Baking Company plant in Omaha, and that the condition of the atmosphere in the rooms where the bread was kept during the twenty-four hour period was not different in any way from the atmospheric conditions prevailing at different times and different seasons throughout the state of Nebraska; that these experiments were made using the regular daily run of dough out of which bread is manufactured at this plant; that this dough is an especially rich dough containing high percentages of milk and fat

and that such dough and bread made therefrom will show less evaporation than will bread baked from dough containing smaller percentages of milk and fats, or containing no milk or fats, and that had these experiments been made from a plain dough containing less milk or no milk, and less fat, the shrinkage in weight would have been much greater; that during the day's run of baking, ovens vary in temperature up to approximately 100 degrees. When the first shift starts work after the ovens have had several hours rest, the temperature of the baking chamber will average from 550 degrees to 575 degrees Fahrenheit. During the process of baking, the heat is extracted from the baking chamber more rapidly than it can be renewed through the firing process, until at or near the end of the baking day the temperature in the baking chamber has been reduced to somewhere between 450 to 475 or 480 degrees, and such varying conditions of oven temperatures prevail universally in all baking plants and are beyond the control of the operator; that while, in the process [fol. 147] of baking bread, and also for twenty-four hours after baking, evaporation of moisture is taking place in varying degrees according to varying conditions, nevertheless the actual food value of the loaves remain the same notwithstanding the evaporation of the moisture and the change in the weight of the loaves.

(Signed) C. S. Jarnagin. Frank Walden. N. R. Mount.

Subscribed in my presence and sworn to before me this 6th day of July, 1921. (Signed) Chris Boyer, Notary Public. (Seal.)

[fol. 148] EVIDENCE: PLAINTIFFS' EX. P-2

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date June 28, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hrs. after	Weight 8 hrs. after	Weight 16 hrs. after	Weight 24 hrs. after	Condition of atmosphere where bread kept
1.....	21 oz.	10.30 A. M.	18¼ oz.	18 oz.	17½ oz.	17 oz.	16½ oz.	Moist.
2.....	21 oz.	10.30 A. M.	18¼ oz.	17¾ oz.	17 oz.	16½ oz.	16¾ oz.	Medium.
3.....	21 oz.	10.30 A. M.	18¼ oz.	17¾ oz.	17 oz.	16¾ oz.	16 oz.	Dry.
4.....	20 oz.	10.30 A. M.	17¼ oz.	17 oz.	16¾ oz.	16¼ oz.	15⅞ oz.	Moist.
5.....	20 oz.	10.30 A. M.	17½ oz.	16¾ oz.	16½ oz.	16 oz.	15¾ oz.	Medium.
6.....	20 oz.	10.30 A. M.	17¾ oz.	16½ oz.	16¼ oz.	15¾ oz.	15½ oz.	Dry.

Hot dry weather.

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date June 28, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hrs. after	Weight 8 hrs. after	Weight 16 hrs. after	Weight 24 hrs. after	Condition of atmosphere where bread kept
1.....	21 oz.	10.30 A. M.	18¼ oz.	18 oz.	17½ oz.	17 oz.	16½ oz.	Moist.
2.....	21 oz.	10.30 A. M.	18¾ oz.	17¾ oz.	17 oz.	16½ oz.	16¾ oz.	Medium.
3.....	21 oz.	10.30 A. M.	18¾ oz.	17¾ oz.	17 oz.	16¾ oz.	16 oz.	Dry.
4.....	20 oz.	10.30 A. M.	17¾ oz.	17 oz.	16¾ oz.	16¾ oz.	15⅞ oz.	Moist.
5.....	20 oz.	10.30 A. M.	17¾ oz.	16¾ oz.	16½ oz.	16 oz.	15¾ oz.	Medium.
6.....	20 oz.	10.30 A. M.	17¼ oz.	16½ oz.	16¾ oz.	15¾ oz.	15½ oz.	Dry.

Hot dry weather.

[fol. 150] EVIDENCE: PLAINTIFFS' EX. P-4

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date June 28, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hrs. after	Weight 8 hrs. after	Weight 16 hrs. after	Weight 24 hrs. after	Condition of atmosphere where bread kept
1.....	21 oz.	9.30 A. M.	18¼ oz.	18 oz.	17½ oz.	16¾ oz.	16½ oz.	Moist.
2.....	21 oz.	9.30 A. M.	18¼ oz.	17¾ oz.	17¼ oz.	16½ oz.	16 oz.	Moderate.
3.....	21 oz.	9.30 A. M.	18¼ oz.	17¾ oz.	17¼ oz.	16¾ oz.	15¾ oz.	Dry.
4.....	20 oz.	9.30 A. M.	18 oz.	17½ oz.	17¼ oz.	17 oz.	16¾ oz.	Moist.
5.....	20 oz.	9.30 A. M.	18 oz.	17¾ oz.	16¾ oz.	16¾ oz.	15¾ oz.	Moderate.
6.....	20 oz.	9.30 A. M.	18 oz.	17¼ oz.	16¾ oz.	16 oz.	15½ oz.	Dry.

Hot dry weather.

[fol. 151] EVIDENCE: PLAINTIFFS' EX. P-5

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date July 4, 1921

Test	Baked	Scaling weight of dough in each loaf	Weight when baked	Weight 12 hrs. after	Weight 24 hrs. after	Shrinkage	Cooling location
1	8:30 A. M.	18½ oz.	16½ oz.	16 oz.	14¾ oz.	1¾ oz.	Dry place.
2	8:30 A. M.	18½ oz.	16¼ oz.	15¾ oz.	14¾ oz.	2 oz.	" "
3	8:30 A. M.	18½ oz.	16¾ oz.	16¼ oz.	14¾ oz.	2 oz.	" "
4	8:30 A. M.	18½ oz.	16¾ oz.	15½ oz.	14 oz.	2¼ oz.	" "
5	8:30 A. M.	18½ oz.	16¼ oz.	15¼ oz.	15 oz.	1¼ oz.	Extreme Moist.
6	8:30 A. M.	18½ oz.	16½ oz.	16 oz.	15¾ oz.	1¼ oz.	" "

[fol. 152] EVIDENCE: PLAINTIFFS' EX. P-6

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date July 1, 1921

Test	Hour baked	Dough scaled	Weight baked	3 hrs. later	12 hrs. later	24 hrs. later	Total loss	Location in oven	Location cooling
1 (1)	11:15 A. M.	18½ oz.	17 oz.	16½ oz.	16 oz.	15½ oz.	3 oz.	Front.	Dry.
1 (2)	11:15 A. M.	18½ oz.	16¾ oz.	16¼ oz.	15¾ oz.	15¼ oz.	3¼ oz.	Middle.	Dry.
1 (3)	11:15 A. M.	18½ oz.	16½ oz.	16 oz.	15¼ oz.	14¾ oz.	3¾ oz.	Back:	Dry.
2 (1)	2:00 P. M.	18½ oz.	16½ oz.	16 oz.	15¾ oz.	15½ oz.	3 oz.	Middle.	Medium.
2 (2)	2:00 P. M.	18½ oz.	15¾ oz.	15¼ oz.	15 oz.	14¼ oz.	4¼ oz.	Back.	"
2 (3)	2:00 P. M.	18½ oz.	16¾ oz.	16¼ oz.	15¾ oz.	15¼ oz.	3¼ oz.	Front.	"
1 (1)	5.00 P. M.	18½ oz.	16¼ oz.	16¾ oz.	15¾ oz.	15¾ oz.	3¼ oz.	Middle.	Moist.
1 (2)	5:00 P. M.	18½ oz.	16 oz.	15½ oz.	15 oz.	14½ oz.	4 oz.	Back.	"
1 (3)	5:00 P. M.	18½ oz.	15¾ oz.	15¼ oz.	14¾ oz.	14¼ oz.	4¼ oz.	Front.	"

1. Hot oven.
2. Medium oven.
3. Cool oven.

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date July 3, 1921

Test	Hour baked	Dough scaled	Weight baked	3 hrs. later	12 hrs. later	24 hrs. later	Total loss	Location in oven	Location cooling
1	8:00 A. M.	18½ oz.	17¼ oz.	16¾ oz.	16¼ oz.	15¾ oz.	2¾ oz.	Front.	Dry.
2	8:00 A. M.	18½ oz.	17 oz.	16½ oz.	16 oz.	15½ oz.	3 oz.	Middle.	"
3	8:00 A. M.	18½ oz.	16¾ oz.	16¼ oz.	15¾ oz.	15¼ oz.	3¼ oz.	Back.	"
1	12:00 A. M.	18½ oz.	17 oz.	16½ oz.	16 oz.	15½ oz.	3 oz.	Front.	Moderate.
2	12:00 M.	18½ oz.	16¾ oz.	16¾ oz.	15¾ oz.	15¼ oz.	3¾ oz.	Middle.	"
3	12:00 M.	18½ oz.	16½ oz.	16 oz.	15½ oz.	15 oz.	3½ oz.	Back.	"
1	3:30 P. M.	18½ oz.	16¼ oz.	16¼ oz.	15¼ oz.	15¼ oz.	3¼ oz.	Front.	Moist.
2	3:30 P. M.	18½ oz.	16½ oz.	16¾ oz.	15½ oz.	15 oz.	3½ oz.	Middle.	"
3	3:30 P. M.	18½ oz.	16¼ oz.	16 oz.	15¼ oz.	14¾ oz.	3¾ oz.	Back.	"

1. Fresh oven.
2. Medium oven. Very humid atmosphere.
3. Cool oven.

[fol. 154] EVIDENCE: PLAINTIFFS' EXHIBIT Q

For Plaintiffs

STATE OF NEBRASKA,
County of Douglas, ss:

Frank Walden, and N. R. Mount, being each first duly sworn according to law, deposes and says that each is a foreman for Jay Burns Baking Company in its baking plant at 20th Cumings Streets, Omaha, Nebraska, and that each is a practical baker and entirely familiar with all the equipment used in such process; that on February 8, 9, 10, 11, 13 and 14, 1921, affiants, together with one C. E. Martin, then an employe of Jay Burns Baking Company, but who has now left such employ and has left the state of Nebraska, made experiments in the baking of bread in order to obtain results showing the evaporation of moisture during the baking process and up to twenty-four hours after such baking process; that attached hereto are sheets showing the results of the experiments on the different dates numbered respectively, 1, 2, 3, 4, 5 and 6, the tests being numbered in the first column, the weight of the dough, called the "scaling weight" in the second column, the time at which the baking occurred during the day in the third column, the weight when the bread was taken out of the oven in the fourth column, the weight of the same bread three hours after same was taken out of the oven in the fifth column, the weight of the bread twenty-four — after being baked in the sixth column, and the general nature of the temperature of the place where the bread was kept in the seventh column; that the tests were made with normal conditions prevailing in the bakery and with the regular equipment used in such bakery, and that the operations were the same as are used regularly in the baking of bread and the preparation of the dough therefor in such bakery; that the temperature and humidity of the places where the bread was kept for the twenty-four hour [fol. 155] period after baking represent, in a general way, the varying conditions of the atmosphere on different days while the bread is being baked and kept by the Jay Burns Baking Company at its bakery in Omaha and represent no conditions other than those conditions which are constantly found in the regular course of the bakery business, that these experiments were made using the regular daily run of dough out of which bread is manufactured at this plant; that this dough is an especially rich dough containing high percentages of milk and fat and that such dough and bread made therefrom will show less evaporation than will bread baked from dough containing smaller percentages of milk and fats, or containing no milk or fats; and that had these experiments been made from a plain dough containing less milk or no milk, and less fat, the shrinkage in weight would have been much greater; that during the day's run of baking the ovens vary in temperature up to approximately 100 degrees. When the first shift starts work after the ovens have had several hours rest, the tem-

perature of the baking chamber will average from 550 degrees to 575 degrees Fahrenheit. During the process of baking the heat is extracted from the baking chamber more rapidly than it can be renewed through the firing process, until at or near the end of the baking day the temperature in the baking chamber has been reduced to somewhere between 450 to 475 or 480 degrees, and such varying conditions of oven temperatures prevail universally in all baking plants and are beyond the control of the operator; that while, in the process of baking bread, and also for twenty-four hours after baking, evaporation of moisture is taking place in varying degrees according to varying conditions, nevertheless the actual food [fol. 156] value of the loaves remain the same notwithstanding the evaporation of the moisture and the change in weight in the loaves.

(Sgd.) Frank Walden. N. R. Mount.

Subscribed in my presence and sworn to before me this 6th day of July, 1922. (Sgd.) Chris Boyer, Notary Public.

(Seal.)

[fol. 157] EVIDENCE: PLAINTIFFS' EX. Q-2

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date February —, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf 24 hrs. after baking	Condition of atmosphere where bread kept
1	18½ oz.	6:15 A. M.	17¼ oz.	16⅝ oz.	16 oz.	Dry atmosphere.
2	18½ oz.	9:40 A. M.	16⅞ oz.	16½ oz.	14½ oz.	" "
3	18½ oz.	11: A. M.	17⅛ oz.	16⅝ oz.	16⅜ oz.	Moist "
4	18½ oz.	12:10 P. M.	16⅝ oz.	16⅛ oz.	15¼ oz.	" "
5	18½ oz.	3:10 P. M.	16⅝ oz.	16 oz.	15⅞ oz.	Medium "
6	18½ oz.	5:35 P. M.	17½ oz.	16¾ oz.	15¾ oz.	" "

[fol. 158]

EVIDENCE: PLAINTIFFS' EX. Q-3

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date February —, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf 24 hrs. after baking	Condition of atmosphere where bread kept
1	18½ oz.	6:15 A. M.	17⅜ oz.	16¾ oz.	16 oz.	Moderate atmos.
2	18½ oz.	8:15 A. M.	16¼ oz.	16¼ oz.	15⅛ oz.	Moist "
3	18½ oz.	10:15 A. M.	16⅞ oz.	16¼ oz.	15¾ oz.	Dry "
4	18½ oz.	11:45 A. M.	16⅞ oz.	16¼ oz.	14¼ oz.	" "
5	18½ oz.	1:25 P. M.	16½ oz.	16⅛ oz.	15⅞ oz.	Moist "
6	18¢ oz.	5:35 P. M.	17 oz.	16½ oz.	15⅛ oz.	Moderate "

[fol. 159] EVIDENCE: PLAINTIFFS' EX. Q-4

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date February —, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf 24 hrs. after baking	Condition of atmosphere where bread kept	
1	18½ oz.	6:20 A. M.	17 oz.	16½ oz.	15⅜ oz.	Moderate	atmos.
2	18½ oz.	8:10 A. M.	16½ oz.	16¼ oz.	15⅞ oz.	"	"
3							
4	19 oz.	10:10 A. M.	17½ oz.	16⅞ oz.	15¼ oz.	Moist	"
5	19 oz.	12:00 M.	17½ oz.	16¾ oz.	16⅜ oz.	"	"
6	19 oz.	4:00 P. M.	16⅝ oz.	16 oz.	15⅞ oz.	"	"
7	19 oz.	6:00 P. M.	17½ oz.	16⅞ oz.	15 oz.	"	"

[fol. 160]

EVIDENCE: PLAINTIFFS' EX. Q-5

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date February —, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf 24 hrs. after baking	Condition of atmosphere where bread kept
1	19 oz.	6:30 A. M.	17⅝ oz.	16⅞ oz.	16⅜ oz.	Dry atmosphere.
2	19 oz.	8:45 A. M.	16¾ oz.	16¾ oz.	14⅞ oz.	" "
3	19 oz.	11:00 A. M.	17⅞ oz.	17⅛ oz.	16⅞ oz.	Moist "
4	19 oz.	4:00 P. M.	17½ oz.	17⅛ oz.	16⅝ oz.	" "
5	19 oz.	5:45 P. M.	17¾ oz.	16⅞ oz.	16⅛ oz.	Moderate "
6	19 oz.	8:10 P. M.	17¼ oz.	16¾ oz.	16⅛ oz.	" "

[fol. 161]

EVIDENCE: PLAINTIFFS' EX. Q-6

For Plaintiffs

Experiments in Bread Baking at the Jay Burns Baking Plant, 20th and Cuming Streets, Omaha, Nebraska, on Date February —, 1921

Test	Scaling weight of dough in each loaf	Time at which baked	Weight of loaf when taken from oven	Weight of loaf three hours after baking	Weight of loaf 24 hrs. after baking	Condition of atmosphere where bread kept
1	19 oz.	7:15 A. M.	17⅛ oz.	16½ oz.	16⅛ oz.	Dry atmosphere.
2	19 oz.	9:15 A. M.	17⅝ oz.	16⅞ oz.	15⅛ oz.	" "
3	19 oz.	11:00 A. M.	17½ oz.	17⅛ oz.	16⅞ oz.	Moist "
4	19 oz.	2:20 P. M.	17¾ oz.	17¼ oz.	16½ oz.	" "
5	19 oz.	4:00 P. M.	17 oz.	16¾ oz.	16⅛ oz.	Moderate "
6	19 oz.	5:15 P. M.	17½ oz.	17 oz.	16½ oz.	" "

(Here follows comparative table, marked side folio page 162.)

Plaintiffs Introduced

Meteorological Summary

1921	Highest temperature	Lowest temperature	Normal temperature	Highest humidity	Lowest humidity	Greatest variation in humidity in 12 hrs.
	Degrees	Degrees	Degrees	%	%	%
Jan.	58	7	20	100	41	53
Feb.	74	12	23.7	98	40	48
March	85	14	36	99	17	54
April	87	25	50.5	98	15	48
May	94	37	62.5	99	38	36
June	98	55	71.6	97	34	36
July	97	62	76.5	95	42	34
Aug.	97	57	74.4	99	37	34
Sept.	94	46	65.8	98	18	56
Oct.	80	31	....	99	28	49
Nov.	62	16	....	100	35	41
Dec.	52	–7	....	98	22	33

[fol. 164] EVIDENCE: DEFENDANTS' EXHIBIT "S"

For Defendants

DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

[Title omitted]

Affidavit Opposing Alolwance of Temporary Injunction

STATE OF NEBRASKA,
County of Lancaster, ss:

I, John Ashley Lett of the City of Lincoln, County of Lancaster, State of Nebraska duly sworn, depose and say that my residence is as above stated *amd tjat fpr fpirteem uears* last past I have been engaged in the business of baking principally in the City of Lincoln, Nebraska. That I have followed said business for fourteen years and am familiar with the operation of same and the baking of bread; that I know of my own knowledge that under ordinary conditions of the ordinary bakery that loaves of bread may be baked of any desired weight; that it is possible to bake loaves of bread weighing one-half pound or within two ounces in excess thereof after twenty-four hours have expired after baking same; that it is possible to bake loaves of bread weighing one pound or within two [fol. 165] ounces in excess thereof after twenty-four hours have expired after the baking thereof; and that the same is true of loaves of bread weighing one and one-half pounds with the same tolerance and loaves of bread weighing any multiple of one pound, with the same tolerance and within the same length of time. That it is possible to bake twin loaves of bread each twin or half of that loaf not exceeding in weight the regular specifications with the same tolerance as to weight and the same specifications as to time; and that said loaves when taken from the oven during said period of twenty-four hours would at no time exceed in weight the specified weight for each loaf respectively, including the tolerance or variance of two ounces as above stated.

Affiant further states that it is possible to bake twin loaves of bread where each twin or half of the loaf should not exceed in weight one-half pound and one ounce tolerance or variance for one-half the loaf.

Affiant further says that no special size or shape of pan is requisite in order to bake said loaves of bread in accordance with the above specifications and that same can be baked in any bakery having an ordinary baking equipment.

Further affiant sayeth not.

(Sgd.) John Ashley Lett.

Subscribed in my presence and sworn to before me this 21st day of July, 1921. (Sgd.) Clara M. Miskell, Notary Public. (Seal.) My commission expires 3d day of Feb. 1925.

[fol. 166] EVIDENCE: DEFENDANTS' EXHIBIT "T"

For Defendants

DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

[Title omitted]

Affidavit Opposing Allowance of Temporary Injunction

STATE OF NEBRASKA,
County of Lancaster, ss:

I, Harley E. Mertz, of the City of Lincoln, County of Lancaster, State of Nebraska, duly sworn depose and say that my residence is as above stated and that for 17 years last past I have been engaged in the business of baking principally in the City of Lincoln, Nebraska. That I have followed said business for 17 years and am familiar with the operation of same and the baking of bread; that I know of my own knowledge that under ordinary conditions of the ordinary bakery that loaves of bread may be baked of any desired weight within a tolerance of variance of two ounces from the desired weight; that it is possible to bake loaves of bread weighing one-half pound or within two ounces in excess thereof after twenty-four hours have expired after baking same; that it is possible to bake loaves of bread weighing one pound or within two ounces in excess thereof after twenty-four hours have expired after the baking [fol. 167] thereof; and that the same is true of loaves of bread weighing one and one-half pounds with the same tolerance and loaves of bread weighing any multiple of one pound with the same tolerance and within the same length of time. That it is possible to bake twin loaves of bread each twin or half of that loaf not exceeding in weight the regular specifications with the same tolerance as to weight and the same specifications as to time; and that said loaves when taken from the oven during said period of twenty-four hours would at no time exceed in weight the specified weight for said loaf respectively, including the tolerance or variance of two ounces as above abated.

Affiant further states that it is possible to bake twin loaves of bread where each twin or half of the loaf should not exceed in weight one-half pound and one ounce tolerance or variance for one-half the loaf.

Affiant further says that no special size or shape of pan is requisite in order to bake said loaves of bread in accordance with the above specifications and that same can be baked in any bakery having an ordinary baking equipment.

Further affiant sayeth not.

(Sgd.) Harley E. Mertz.

Subscribed in my presence and sworn to before me this 21st day of July, 1921. Clara M. Miskell, Notary Public.
(Seal.) My commission expires 22 day of Febr., 1925.

[fol. 168] EVIDENCE: DEFENDANTS' EXHIBIT U

For Defendants

Bread Baked Saturday, July 23, 1921, by Swoboda Bakery, 14th & Williams Street, Omaha, Nebraska

	Weight scaled in dough	Weight when baked	24 hours after baking
13	17½	16	15¾
14	17½	16⅛	15⅞
15	17½	16¼	16
16	17½	16	15¾
1	18	16½	16⅛
2	18	16¼	16
3	18	16⅛	15⅞
4	18	16¼	16
9	18½	16¾	16½
10	18½	16¾	16⅜
11	18½	16½	16⅛
12	18½	16½	16⅛

[fol. 169] EVIDENCE: DEFENDANTS' EXHIBIT 22

Bread Baked at Lett Nakery, Lincoln, Oct. 20, 1921

	Dough scaled 28 oz.	Bread when baked	Weight of bread 24 hrs. after
1	28 oz.	26½	25¼
2	28 oz.	26	25¼
3	28 oz.	25¾	25
4	28	25½	25
5	28	25¾	25
6	28	25½	25
7	28	26	25¼
8	28	26	25½
9	28	25¾	25½
10	28	25¼	24¾
11	28	25½	25¼
12	28	25¾	25¼
13	28	25	24¾
14	28	25¾	25¼
15	28	25½	25
16	28	25¼	25
17	28	25½	25
18	28	25½	25¼
19	28	25¼	25

20	28	25½	25
21	28	25½	25¼
22	28	25¼	25
23	28	25	24¾
24	28	25¾	25

[fol. 170] EVIDENCE: DEFENDANTS' EXHIBIT 26

Graham Bread Baked at Lett Bakery, Oct. 21, 1921

	Dough scaled 19 oz.	Bread when baked	Bread 24 hrs. after
1	19	18 oz.	17½ oz.
2	19	18	17½
3	19	17¾	17¾
4	19	18	17½
5	19	17½	17¾
6	19	..	17¼
7	19	17¾	17½
8	19	18	17¾
9	19	17½	17¼
10	19	17¾	17¼
11	19	18	17¾
12	19	17½	17¼
13	19	17¾	17½
14	19	17¾	17½
15	19	18	17½
16	19	17¾	17½
17	19	17½	17
18	19	17¾	17½
19	19	17½	17
20	19	17¾	17½
21	19	17¾	17½
22	19	17½	17
23	19	17¾	17½
24	19	17¾	17½

[fol. 171] EVIDENCE: DEFENDANTS' EXHIBIT 9

For Defendants

Bread Baked Friday, July 22, 1921, at Lett's Bakery

No.	Weight dough scaled		Weight bread when baked	Weight bread 24 hours after baking
1	19 oz.	....	17¼	16⅞ oz.
2	19	....	18	17½ "
3	19	17	17⅜	17¼ "
4	19	....	17⅜	17 "
5	19	....	17½	17 "
6	19	16⅜	17¼	16¾ "
7	19	....	17½	17⅛ "
8	19	16¾	17½	17 "
9	19	16¾	17¼	16¾ "
10	19	17⅛	17¾	17¼ "
11	19	16½	17	16⅝ "
12	19	16¾	17⅜	16⅞ "
13	19	....	17¼	16¾ "
14	19	....	17¼	16⅞ "
15	19	....	17¼	16¾ "
16	19	16¼	17¼	16⅞ "
17	19	16¾	17¼	16⅞ "
17	19	16⅛	17	16⅝ "
18	19	16½	17⅛	16¾ "
19	19	16½	17⅛	16¾ "
20	19	....	17	16⅝ "
21	19	....	17¼	16⅞ "
22	19	....	17⅛	16⅞ "
23	19	....	17	16⅝ "
24	19	....	17⅛	16¾ "
25	19	16¼	17	16⅝ "
26	19	....	17	16⅝ "
27	19	16½	17	16⅝ "
28	19	....	16¾	16⅜ "
29	19	16⅜	16¾	16½ "
30	19	....	17⅛	16¾ "
31	19	16⅝	17⅛	16¾ "
32	19	16½	17⅛	16¾ "

[fol. 172] EVIDENCE: DEFENDANTS' EXHIBIT 13

Bread Baked Saturday, July 23, 1921, at Lett's Bakery

No.	Weight dough scaled	Weight bread when baked	Weight bread 24 hours after baking
1	19 oz.	17 oz.	16¾
2	19	16½ "	16¼
3	19	16¾ "	16½
4	19	16¾ "	16½
5	19	17 "	16¾
6	19	17 "	16¾
7	19	16½ "	16¼
8	19	16¾ "	16½
9	19	17 "	16¾
10	19	17 "	16⅜
11	19	16¾ "	16¾
12	19	17 "	16¾
13	19	17 "	16¼
14	19	17¼ "	17
15	19	17 "	16¾
16	19	16¾ "	16⅝
17	19	16¾ "	16½
18	19	17 "	16¾
19	19	16¾ "	16½
20	19	17 "	16¾
21	19	16¾ "	16⅝
22	19	17 "	16¾
23	19	17 "	16⅞
24	19	16¾ "	16⅝
25	19	17 "	16⅞
26	19	17¼ "	17
27	19	16¾ "	16½
28	19	16¾ "	16⅝
29	19	17 "	16¾
30	19	16½ "	16⅜
31	19	17 "	16⅞
32	19	17 "	16⅞

[fol. 173] DEFENDANTS' EXHIBIT "G"

Loaves of Bread Baked at Sunlite Bakery, Lincoln, July 23, 1921

	Bread scaled in dough	Loaves when baked	Loaves 24 hours after
1	18 oz.	17¾	17
2	18	17	16
3	18	17	16
4	18	17	16
5	18	17½	16⅜
6	18	17	16½
7	18	17¾	17
8	18	17½	17
9	18	17¾	16⅜
10	18	17½	17
11	18	17	16¼
12	18	17¾	17
13	18	17	16
14	18	16½	16
15	18	17	16
16	18	17	16¼
17	18	17	16¼
18	18	17½	16¼
19	18	17	16¼
20	18	17	16⅜
21	18	17¾	17
22	18	17½	17
23	18	17¾	16¼
24	18	17½	17
25	18	17¾	17
26	18	17½	17
27	18	16	15½
28	18	16½	16
29	18	17¼	17
30	18	17½	16¼

[fol. 174] In connection with the testimony of Thomas J. Dunn, defendants introduced Exhibits 19, 20 and 21 (B 584-586) as follows:

[fol. 175] EVIDENCE: DEFENDANTS' EXHIBIT 19

Minor S. Bacon, Reporter

Average Weight of 15¢ Loaves

Sept. 24, 1921

Peterson & Pegeau

	Hard roll	Tip top
1	23½ oz.	23
2	21	22½
3	22	22¾
4	22½	21¼
5	24	24
6	22	24
7	22½	23
8	22½	....
9	21¾	....
10	22¼	....
	224 oz.	160½
	Ave. wt. 22.4 oz.	22.9 oz. ave. wt.

[fol. 176] EVIDENCE: DEFENDANTS' EXHIBIT 20

Minor S. Bacon, Reporter

Average Weight of 15¢ Loaves

Aug. 13, 1921

	Skinner	Peterson & P.	Peterson & P.
1	23 oz.	21	24
2	24	22	21
3	24	22	24
4	23¾	20	23
5	24	22¼	23½
6	24	....	23¼
7	24½	....	23½
			22¾
	167¼	107¼	23¾
	23.9 ave. wt.	21.5 ave. wt.	25
			233¾
			23.3⅞ ave. wt.

Average Weight of 15¢ Loaves—Continued

	Blue ribbon	Schultz	Burns
1	23½	24¼	24½
2	24	24	24½
3	23¾	24	24
4	23	24	24¼
5	23	24	24½
6	23	24	24
7	22½	24	24
8	22	24	24
9	23	23¾	25½
10	23	24	24
	230¾	240½	243¼
	23 ave. wt.	24 ave. wt.	24.3 ave. wt.

[fol. 177] EVIDENCE: DEFENDANTS' EXHIBIT 21

Minor S. Bacon, Reporter

Average Wt. of 10¢ Loaves

Aug. 13, 1921

	Ortman
1	16 oz.
2	16
3	14½
4	16¼
5	16
6	16⅛
7	16¼
8	16½
9	16
10	16¼
11	16½
12	16⅛
	192½
	16 1/6 oz. ave. wt.

[fol. 178] EVIDENCE: DEFENDANTS' EXHIBIT 16

Defendants introduced Exhibit 16 (B. 591) which was a copy o an advertisement of the Jay Burns Baking Company which was pub lished in the Omaha Bee March 14, 1913. The exhibit in part i as follows:

"We actually Manufacture Our Own Weather at Our Bakery!

"The weather has always been a hard master to the baker. On clear days when the air is fresh the dough raises fine. But on a damp, heavy day the dough refuses to act just right and the bread is not up to quality.

"With the aid of the wonderful apparatus shown above we have absolute control over weather conditions in all parts of our wonderful bakery.

"No matter whether the sun is shining or the rain is pouring down, no matter whether the sultry breezes of summer or the icy blasts of winter constitute the weather out of doors, inside the dough-room at the Burns Bakery the air will always be just the right temperature. * * * This purified air is automatically tested. If too dry, moisture is added, if too damp, this air is dried; if too warm, it is cooled by refrigeration; if too cool, it is warmed by steam. Day in and day out, the temperature and relative humidty of the air discharged from this 'humidifier' varies less than two per cent" (B. 591).

[fol. 179] Defendants introduced—

Exhibit H is a copy of an advertisement of Jay Burns Baking Company wherein it is stated that the 15 cent loaf will be increased four ounces in size and the 10 cent loaf will be increased 2½ ounces (B. 159).

EXHIBIT 17 (B. 592)

is a copy of an advertisement of the Petersen & Pegan Baking Co. as follows:

"Every breath of air that comes within the walls of any part of this Great Modern Bakery is thoroughly washed and purified every ten minutes. The temperature is likewise controlled year around. These details show to what care we go to insure the even quality of Hard Roll Bread."

[fol. 180] And afterwards, to wit, on June 12, 1922, there was rendered by said Supreme Court of Nebraska and entered of record upon the journal thereof, a certain Judgment in the words and figures following, to wit:

[fol. 181] SUPREME COURT OF NEBRASKA, JANUARY TERM, A. D. 1922, June 12

No. 22452

[Title omitted]

JUDGMENT

Appeal from the District Court of Lancaster County

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedins and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and same hereby is, affirmed at the costs of appellants, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Rose, J.

A. M. Morrissey, Chief Justice.

[fol. 182] And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion of said court, pursuant to which the preceding judgment was rendered, which opinion is in the words and figures following, to wit:

[fol. 183] 8940

No. 22452

JAY BURNS BAKING CO.

v.

MCKELVIE.

OPINION—Filed June 12, 1922

1. The legislature in the exercise of police power may establish reasonable minimum and maximum standards of weights for loaves of bread.
2. The legislature is presumed to act with full knowledge of all facts essential to valid legislation, when it adopts a regulation in the exercise of police power.
3. If plaintiffs assail legislation as unreasonable, the burden is on them to prove every fact essential to a determination of that issue in their favor.
4. The use of wax-paper or other means of retard- evaporation of moisture in bread may be required for the purpose of keeping it

in a good state of preservation for 24 hours as an incidental result of a police regulation establishing standards of minimum and maximum weights for loaves of bread.

[fol. 184] 5. The exercise of police power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property.

6. Tests to prove the unreasonableness of a tolerance of two ounces to the pound in excess of standards of weights for loaves of bread for 24 hours after it is baked, as not allowing a sufficient margin for loss of weight by evaporation of moisture, are not conclusive, in absence of proof that reasonable precuations were taken to retard evaporation by the use of wax-paper for wrappers or by other means.

7. Standard minimum and maximum weights for loaves of bread of one-half pound, one pound, one and one-half pounds, and exact multiples of one pound, with a tolerance of two ounces to the pound in excess of standard maximum weights, held not shown to be void as unreasonable, or as discriminatory or as depriving plaintiffs of the equal protection of the laws.

[fol. 185] Heard Before Morrissey, C. J.; Letton, Dean, Rose, Aldrich, Day, and Flansburg, JJ.

Rose, *J.*:

This is a suit for an injunction to prevent the enforcement of the legislative act of 1921, providing: "Every loaf of bread, made or procured for the purpose of sale, sold, exposed or offered for sale in the state of Nebraska, shall be the following weights, avoirdupois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound, and of no other weights." A rate of two ounces to the pound, and no more, in excess of the maximum standard weights is tolerated by the act. Unreasonableness of the regulation or impossibility of complying with the standards fixed by the legislature is the principal plea for an injunction.

The Jay Burns Baking Company, plaintiff, is a Nebraska corporation with a capital stock of $252,000. It manufactures bread for commercial purposes in Omaha and distributes its products in Nebraska and surrounding states. Its annual output of bread is estimated at 10,000,000 pounds, valued at $1,000,000. The other plaintiffs are engaged in the same enterprise on an extensive scale. Plaintiffs sue for themselves and for others similarly situated. The act in question is in the following form:

"Section 1. It shall be the duty of the department of agriculture to enforce all provisions of this act. It shall make or cause to be made all necessary examinations and shall have authority to pro- [fol. 186] mulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this act.

"Section 2. Every loaf of bread, made or procured for the purpose of sale, sold, exposed or offered for sale in the state of Nebraska, shall be the following weights, avoirdupois: One-half pound, one pound,

one and one-half pounds, and also in exact multiples of one pound, and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

"Section 3. A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed, and no more; provided, that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not be less than the minimum nor more than the maximum prescribed by this act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking; provided, that bread shipped into this state shall be weighed where sold or exposed for sale.

"Section 4. Any person, firm or corporation violating any of the provisions of this act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days; provided, however, [fol. 187] that upon the second and all subsequent convictions for the violation of any of the provisions of this act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days." Laws 1921, ch. 2.

The legislation is challenged on the ground that it violates the fourteenth amendment to the federal Constitution, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" that it violates section 3, art. I of the Nebraska Constitution, providing, "no person shall be deprived of life, liberty, or property, without due process of law;" that it violates section I of the Nebraska bill of rights, protecting "life, liberty and the pursuit of happiness."

On issues raised by the pleadings, plaintiffs took the position that, owing to physical conditions, such as humidity and temperature, and the natural process of evaporation, varying the weight of loaves in the baking pan, in the oven, and in storage, the manufacture and distribution of bread for commercial purposes on a large scale were impracticable without violating the legislative act and subjecting the manufacturers, however conscientious and law-abiding, to fine and imprisonment, and that therefore the regulation was unreasonable, unconstitutional and void. On this phase of the case experiments [fol. 188] covering considerable periods of time were made. Testimony was adduced by both sides at great length. After a full hearing the trial court sustained the legislation and dismissed the suit. Plaintiffs have appealed.

The manufacture of bread as an article of commerce is of course a legitimate enterprise and those engaged therein are protected in their constitutional rights. At the same time bread is a necessary of life in universal use without regard to poverty or wealth, class or station. Society as a whole is interested in the quality, quantity, condition, and distribution of the manufactured product. The police power of government extends to these subjects for the protection of public health and welfare. The loaf is the usual form in which the food reaches the consumer. The individual purchaser of a day's supply of bread makes too small an investment to justify litigation for the protection of his rights, if wronged, but he must have food in any event. A standard weight exacted by the state is a safe-guard against fraud and imposition.

It is conceded that plaintiffs can comply with the minimum standards, "one-half pound, one pound," and "one and one-half pounds," and "exact multiples of one pound," because dough enough to prevent short weights can be used. Plaintiffs admit that legislation fixing a minimum weight has been sustained. It is earnestly argued, however, that they cannot limit the maximum weights to the standards fixed by the legislature with a two-ounce tolerance or margin only, for the reason that natural and unavoidable changes in the weights of loaves, owing to atmospheric conditions at different times [fol. 189] and places, exceed two ounces to the pound. The maximum is denounced by plaintiffs as unreasonable and as not serving any useful purpose. Attention is directed to the proposition that variances in the weight of a loaf at different times are due to the evaporation of moisture alone—a natural process which does not affect nutriment or take anything of value from consumers of bread. The intention of the legislature in fixing a maximum is obvious, when the purpose of the statute is considered. The legislation goes beyond a remedy for short-weight loaves and establishes standards of weights for bread to protect the public from fraud and imposition. As already stated the standards are one-half pound, one pound, one and one-half pounds, and "exact multiples of one pound." It is to prevent a loaf of one standard from being increased in size until it can be readily sold for a loaf of a larger standard that a maximum weight is fixed. The test is reasonableness. In a former opinion this language was used:

"A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached. The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under [fol. 190] the guise of police regulation." In re Anderson, 69 Neb. 686.

It is shown that water or moisture, subject to evaporation, is an element of weight in bread at every stage from wheat in the field to the manufactured product in the market. This was no mystery to the legislature and a margin or tolerance of two ounces to the pound for evaporation in 24 hours after baking was allowed. The presumption is that the legislature acted with full knowledge of all facts and conditions essential to valid legislation of this kind. That department of the government was without limit in sources of knowledge and in the means of obtaining information. The burden of proving unreasonableness was on plaintiffs. If they are entitled to equitable relief, their tests and proofs must establish their plea without omitting any facts or circumstances essential to the determination of the issue in their favor.

Of course the legislature cannot require bakers to manufacture a product which will retain exactly the same amount of moisture for 24 hours in spite of the evaporation caused by natural processes operating in varying degrees of intensity outside of human power, owing to changing conditions in climate, altitude, atmosphere and temperature. The statutory margin or tolerance being two ounces to the pound, can bakers, for example, make a loaf 18 ounces in weight that will weigh not less than 16 ounces 24 hours after it is baked? The tests and proofs on behalf of the state tend to show that the regulation is reasonable and can be observed at all times. It is fairly inferable from the evidence adduced by plaintiffs that compliance [fol 191] with the regulation is practicable most of the time, but that, tested by their experiments as made, there are periods when the operation of natural laws will prevent compliance with legislative requirements. There are a number of reasons, however, why the tests made to prove unreasonableness should not be accepted as conclusive. If correctly understood, these tests were made with bread manufactured in the regular course of business, without any attempt to change ingredients or processes or to retard evaporation of moisture in loaves by the use of wax-paper or other means. There is testimony, however, that the changing of ingredients to prevent evaporation would impair the quality of the bread and make it unsalable. It is a well-known commercial custom to wrap loaves of bread in paper adapted to that purpose, and the proofs show that evaporation and absorption are thus retarded. Containers to protect commodities from atmospheric changes are familiar articles in trade and commerce. The act of the legislature does not fix prices but leaves bakers free to make reasonable charges for bread wrapped in inexpensive wax-paper for its preservation in transportation and in the markets. Perishable fruits, composed principally of water, grow in the humid tropics, uniting moisture, light, heat, air and other elements of nature in processes more wonderful than the baker's art. Such fruits are transported to the arid north and there distributed to consumers in good condition during hot seasons. This result is accomplished by retarding the natural agencies of decay and by the care required in the channels of trade and commerce. Precautions to retard evaporation [fol. 192] of moisture in bread for the purpose of keeping it in a good state of preservation for 24 hours may be required as an inci-

dental result of a police regulation establishing standards of maximum weights for loaves of bread. Palatableness, a quality demanded by the public, is affected by excessive evaporation, if food value is not. The exercise of police power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property. The liberty of a citizen to consult his own tastes in selecting a lawful vocation and in conducting a legitimate business is limited by the obligation which his citizenship imposes upon him to respect the right of the public to be protected by the police power of the government. The evidence does not prove that, if reasonable means or precautions are taken by plaintiffs and other bakers to retard evaporation, they cannot comply with the act of the legislature, or that the regulation is unreasonable.

It is further argued that the legislation is not uniform in its operation, that it discriminates between resident and nonresident bakers, and deprives plaintiffs of the equal protection of the laws.

This argument is based on provisions that bread of resident bakers shall be weighed where manufactured, while bread shipped into the state shall be weighed where sold, and that tests shall be made by averaging the weight of not less than 25 loaves of a unit. In this connection plaintiffs insist that they manufacture bread on a large scale where 25 loaves of a unit are available at their bakeries for [fol. 193] tests, while nonresident bakers, shipping into the state bread in quantities less than 25 loaves of a unit, and local bakers making less than 25 loaves of a unit at a time, are not disturbed by tests. It does not appear that the legislation goes beyond reasonable classifications for the purpose of exercising the police power. The law operates uniformly on all of a class and in these respects is valid under familiar principles of constitutional law.

Affirmed.

[fol. 194] THE STATE OF NEBRASKA:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 12th day of June, 1922 with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 12th day of June, 1922.

H. C. Lindsay, Clerk, By P. F. Greene, Deputy. [Seal of the Supreme Court of Nebraska.]

[File endorsement omitted.]

[fol. 195] And afterwards, to wit, on July 17, 1922, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain Petition for a Writ of Error. Said original Writ of Error with the allowance thereof by the Hon. A. Morrissey, Chief Justice of the Supreme Court of Nebraska, and fixing the supersedeas bond, endorsed thereon, is marked "Exhibit A" and forms a part of the return to the Writ of error herein.

[fol. 196] EXHIBIT A. H. C. Lindsay, Clerk

IN THE SUPREME COURT OF NEBRASKA

8940

No. 22452

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 17, 1922

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, and in affirming the judgment of the trial court, the plaintiffs and appellants and each of them hereby pray for a Writ of Error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

Montgomery, Hall & Young, Carrol N. Montgomery, Matthew A. Hall, Raymond G. Young, Attorneys for plaintiff & Appellants.

STATE OF NEBRASKA, *ss:*

SUPREME COURT

Let the Writ of Error issue upon the execution of a bond by Jay Burns Baking Company and the other plaintiffs in the action in the sum of $1,000; such bond when approved to act as a supersedeas.

A. M. Morrissey, Chief Justice Supreme Court of Nebraska.

Dated Lincoln, Nebraska, July 17th, 1922.

[File endorsement omitted.]

[fol. 197] And on the same day there was filed in the office of the Supreme Court certain Assignments of Error. Said original Assignments of Error marked "Exhibit B" is attached hereto and forms a part of the return to the writ of error herein.

[fol. 198] EXHIBIT B. H. C. Lindsay, Clerk

8940

No. 22452

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 17, 1922

Now come the above plaintiffs and file herewith their petition for a Writ of Error and say that there are errors in the record and pro-

ceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court make the following assignment:

The Supreme Court of Nebraska erred in holding and deciding that House Roll No. 24, being Chapter 2, page 56, Session Laws of Nebraska, 1921, and especially Sections 2 and 3 of said Chapter 2, were valid. The validity of said law, and especially of said Sections 2 and 3 was denied and drawn in question by the plaintiffs on the ground of their repugnancy to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Nebraska erred in holding and deciding—

First. That said law and especially said Sections 2 and 3 thereof are not contrary to, and are not in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Second. That such law, and especially Sections 2 and 3 thereof does not deprive plaintiffs and others similarly situated of their liberty or property without due process of law.

[fol. 199] Third. That such law, and especially Sections 2 and 3 thereof does not deny to plaintiffs and others similarly situated within its jurisdiction the equal protection of the laws.

Fourth. That said law, and especially Sections 2 and 3 thereof as applied to these plaintiffs and others similarly situated, does not impair the obligation of contracts—contrary to the provisions of the Federal Constitution, Article 1, Section 10.

Fifth. That such law, and especially Sections 2 and 3 thereof, does not abridge the privileges and immunities of citizens or of the plaintiffs as guaranteed by the Fourteenth Amendment of the Federal Constitution.

For which errors the plaintiffs, Jay Burns Baking Company, Petersen & Pegau Baking Company, Federal System of Bakeries of Omaha, Charles W. Ortman, and James L. Pettys, for themselves and all others interested, pray that the said judgment of the Supreme Court of the State of Nebraska, dated June 12, 1922, be reversed and a judgment rendered in favor of the plaintiffs and for costs.

Montgomery, Hall & Young, Carroll S. Montgomery, Matthew A. Hall, Raymond G. Young, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 200] And on the same day, to wit, July 17, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Supersedeas Bond, with the approval thereof by the Honorable A. M. Morrissey, Chief Justice of the Supreme Court, endorsed thereon. A copy of said Supersedeas Bond and approval by the said Chief Justice marked "Exhibit C," is attached hereto and forms a part of the return to the writ of error herein.

[fols. 201 & 202] EXHIBIT C. H. C. Lindsay, Clerk

In the Supreme Court of Nebraska

8940

No. 22452

[Title omitted]

SUPERSEDEAS BOND—Filed July 17, 1922 (for $1,000.00; approved Morrissey, C. J.)

[Omitted in printing]

[fol. 203] And on the same day, to wit, July 17, 1922, there was issued out of the Supreme Court of the United States by R. C. Hoyt, Clerk of the United States Court for the District of Nebraska, a certain writ of error, which original writ of error with the allowance of the Hon. A. M. Morrissey, Chief Justice of the Supreme Court of Nebraska endorsed thereon, is marked "Exhibit D," attached hereto and forms a part of the return to the said writ of error herein.

[fol. 204] EXHIBIT D. H. C. Lindsay, Clerk

In the Supreme Court of Nebraska

8940

No. 22452

[Title omitted]

WRIT OF ERROR—Filed July 17, 1922

The President of the United States of America to the Honorable the Judge of the Supreme Court of the State of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of equity of the said State in which a decision could be had in the said suit between Jay Burns Baking Company et al., and Samuel R. McKelvie, as Governor et al., wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; a manifest error hath happened, to the great damage of the said Jay Burns Baking Company et al., as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-
[fol. 205] rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 17" day of July, in the year of our Lord, One Thousand Nine Hundred and Twenty-two.

R. C. Hoyt, Clerk Dstrict Court United States, District of Nebraska, Lincoln Division, By J. H. McClay, Deputy. (Seal of United States District Court, District of Nebraska, Lincoln, Division.) Allowed, July 17", 1922. A. M. Morrissey, Chief Justice Supreme Court of Nebraska.

[File endorsement omitted.]

[fol. 206] And on the same day, to wit, July 17, 1922, there was issued by the Supreme Court of the State of Nebraska, a certain Citation, which original Citation with the acceptance of service thereof endorsed thereon, was on said day duly returned to the Clerk of said Supreme Court of Nebraska, and filed in his office. Said original citation with acceptance of service thereof endorsed thereon marked "Exhibit E," is attached hereto and forms a part of the return to the writ of error herein.

[fol. 207] EXHIBIT E. H. C. LINDSAY, CLERK

CITATION AND SERVICE—Filed July 17, 1922

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel R. McKelv . as Governor of the State of Nebraska, and Leo B. Stuhr, as Secretary of the Department of Agriculture of Nebraska, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Nebraska, wherein Jay Burns Baking Company, Petersen & Pegau Baking Company, Federal System of Bakeries of Omaha, Charles W. Ortman, and James L. Pettys, for Themselves and all others interested, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should

not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Nebraska, this 17" day of July 1922.

A. M. Morrissey, Chief Justice Supreme Court of Nebraska. Attest: [Seal of Supreme Court of Nebraska.] H. C. Lindsay, Clerk Supreme Court of Nebraska.

Lincoln, Nebraska, July 17", 1922.

I, the attorney of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

Clarence A. Davis, Attorney General, and C. L. Dort, Assistant Attorney General, Attorneys for the Defendants in Error.

[File endorsement omitted.]

[fol. 208] And on the same day, to wit, July 17, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Nebraska, a certain Stipulation as to the contents of the transcript of the record in said case on appeal to the United States Supreme Court, said original stipulation marked "Exhibit F" is attached hereto and forms a part of the return to the writ of error herein.

[fol. 209] EXHIBIT F. H. C. LINDSAY, CLERK

IN THE SUPREME COURT OF NEBRASKA

8940

No. 22452

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL TO U. S. SUPREME COURT—Filed July 17, 1922

It is stipulated by and between the parties hereto through their respective counsel that the portions of the record which shall constitute the transcript of record on the Writ of Error from the Supreme Court of the United States to the Supreme Court of Nebraska are as follows, viz:

1. Bill in Equity for Injunction.
2. Answer.
3. Reply.
4. Decree of District Court of Lancaster County, Nebraska.
5. Certificates of Judges to Bill of Exceptions.

6. Bill of Exceptions and Stipulation.

6a. Judgment of affirmance in Supreme Court of Nebr.

7. Supreme Court Opinion.

8. Petition for Writ of Error and allowance thereof.

9. Assignment of Errors.

10. Bond.

11. Writ of Error and allowance.

12. Citation and service.

13. Certificate of Lodgment.

14. Stipulation as to printing record.

15. Return to Writ of Error.

16. Copy this Stipulation.

17. Authentication of Transcript of Record.

18. Letter of transmittal.

Matthew A. Hall, Counsel for Plaintiffs. Clarence A. Davis, Attorney General; C. L. Dort, Assistant Attorney General, Counsel for Defendants. Lincoln, Nebraska, July 17, 1922.

[File endorsement omitted.]

[fol. 209a] And on the 17th day of July, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Nebraska, a certain Stipulation for the printing of the record herein in the Supreme Court of the United States. Said original Stipulation marked "Exhibit G" is attached hereto and forms a part of the return to the writ of error herein.

[fol. 209b] SUPREME COURT OF THE UNITED STATES

8940

STIPULATION AS TO PRINTING RECORD—Filed July 17, 1922

[Omitted in Printing]

[File endorsement omitted.]

[fol. 210] STATE OF NEBRASKA, *ss:*

SUPREME COURT

No. 22452

CERTIFICATE OF LODGMENT

[Omitted in Printing]

[fol. 211] STATE OF NEBRASKA, *ss:*

SUPREME COURT

CLERK'S CERTIFICATE

I, Harry C. Lindsay, Clerk of said Court, do hereby certify tha the foregoing pages numbered from 2 to 212 inclusive, are a tru full and complete transcript of the record and proceedings in the ca of Jay Burns Baking Company and others, Plaintiffs, versus Samu R. McKelvie, as Governor of the State of Nebraska, and Another, Defendants, and also of the opinion of the Court rendered therei as the same now appear on file in my office.

In testimony whereof I have hereunto set my hand and affixe the Seal of said Court at my office in Lincoln, Nebraska, this Jul 22, 1922.

Harry C. Lindsay, Clerk Supreme Court of Nebraska. [Sea of the Supreme Court of Nebraska.]

[fol. 212] UNITED STATES OF AMERICA, *ss:*

SUPREME COURT OF NEBRASKA

8940

RETURN TO WRIT OF ERROR

In obedience to the commands of the within Writ, I herewit transmit to the Supreme Court of the United States, a duly certifie transcript of the complete record and proceedings in the within en titled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix th Seal of said Supreme Court of Nebraska, in the City of Lincoln this July 22, 1922.

Harry C. Lindsay, Clerk Supreme Court of Nebraska. [Seal of the Supreme Court of Nebraska.]

Costs of Suit

Plaintiffs' costs, $3.05, paid by plaintiffs.
Defendants' costs, $—, paid by defendants.
Costs of transcript, $8.00, paid by plaintiffs.
Binding " 1.50, " " "

H. C. Lindsay, Clerk Supreme Court of Nebraska.

Endorsed on cover: File No. 29,072. Nebraska Supreme Court. Term No. 94. Jay Burns Baking Company, Petersen and Pegau Baking Company, Federal System of Bakeries of Omaha, et al., plaintiffs in error, vs. Charles W. Bryan, as Governor of the State of Nebraska, et al., &c. Filed August 1st, 1922. File No. 29,072.

Office Supreme Court, U. S.
FILED
APR 9 1923
WM. R. STANSBURY
CLERK

Number [redacted]94

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

JAY BURNS BAKING COMPANY, AND OTHERS, PLAINTIFFS, IN ERROR,

v.

SAMUEL R. MCKELVIE, AS GOVERNOR OF THE STATE OF NEBRASKA, AND LEO B. STUHR, AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF NEBRASKA, DEFENDANTS IN ERROR.

ANSWER TO RULE TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED, AND MOTION FOR SUBSTITUTION.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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Number 522.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

JAY BURNS BAKING COMPANY, AND OTHERS, PLAINTIFFS, IN ERROR,

v.

SAMUEL R. MCKELVIE, AS GOVERNOR OF THE STATE OF NEBRASKA, AND LEO B. STUHR, AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF NEBRASKA, DEFENDANTS IN ERROR.

ANSWER TO RULE TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED, AND MOTION FOR SUBSTITUTION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Plaintiffs in Error, through their Solicitors, in answer to the Rule to show cause why this case should not be dismissed for lack of statutory authority to substitute the new Governor for the Ex-Governor in view

of the decisions in *Irwin* v. *Webb*, 258 U. S. 219, decided March 20, 1922, and *United States* v. *Butterworth*, 169 U. S. 600, respectfully answer and show:

I.

That this action is against Samuel R. McKelvie, Governor, and Leo B. Stuhr, Secretary, as composing the Department of Agriculture, one of the Departments or Boards created by the Legislature of Nebraska for the government of the State, which Department is a continuing body composed of the Governor and Secretary, and, therefore, this case is within the exception pointed out in *Thompson* v. *United States*, 103 U. S. 480, and referred to in the Butterworth case; and is not within the rule announced in the first point of the syllabi in *Irwin* v. *Webb*, but is within the fourth point of the syllabi in that case.

Here it is the Department of Agriculture which is charged with the enforcement of the law claimed to be in violation of the Federal Constitution, and the Governor and Secretary are made defendants only because they are given charge of such Department and are held responsible for its actions.

II.

Moreover the law of the State of Nebraska has been held by the Supreme Court of that State to permit the substitution of the successor in office in place of his predecessor, and it is the common practice in that State to permit substitution of one State Officer for another

whose term of office has expired (See affidavit attached hereto), so this case is within the rule announced in the second point of the syllabi in *Gorham* v. *Wendell,* decided February 9, 1923, and in the first point of the syllabi in *City of Boston* v. *Jackson,* decided December 4, 1922.

And in support of this showing, brief is submitted herewith.

III.

And Plaintiffs in Error respectfully show to the Court that since the rule to show cause in this case was ordered, one Grant Shumway has been appointed as Secretary of the Department of Agriculture in place and stead of Joseph W. Mayer and his predecessor, Leo B. Stuhr.

Wherefore Plaintiffs in Error pray that the said Grant Shumway be substituted as Defendant in Error in the place and stead of Leo B. Stuhr; and that Charles W. Bryan be substituted as Defendant in Error in place of his predecessor, Samuel R. McKelvie.

MATTHEW A. HALL,
CARROLL S. MONTGOMERY,
RAYMOND G. YOUNG,
Solicitors for Plaintiffs in Error.

MATTHEW A. HALL,
Of Counsel.

Omaha, Nebraska,
April 2, 1923.

The undersigned are solicitors for Defendants in Error and for their successors in office, Honorable

Charles W. Bryan and Grant Shumway, and join in the showing and request herein for substitution.

O. S. SPILLMAN,
Attorney General of Nebraska,

LLOYD DORT,
Assistant Attorney General of Nebraska and per se Assistant.

Lincoln, Nebr., April 2, 1923.

STATE OF NEBRASKA, }
} ss.
COUNTY OF DOUGLAS. }

I, Matthew A. Hall, being first duly sworn say that I am one of the solicitors for the plaintiffs, Jay Burns Baking Company and others, in their action against Samuel R. McKelvie, as Governor of the State of Nebraska, and another, and that I have obtained from the Clerk of the Supreme Court of Nebraska, a duly certified copy of application for substitution of the newly elected Governor for the outgoing Governor and the order allowing such substitution in the case of *State ex rel. Jehorek versus Samuel R. McKelvie, as Governor,* No. 22281, which certified copy is attached hereto and made a part hereof; that I have also obtained from Robert Smith, Clerk of the District Court of Douglas County, Nebraska, a certified copy of the motion to substitute the successors in office of Samuel R. McKelvie, Governor, and Leo Stuhr, Secretary, Department of Agriculture, and the order allowing such substitution in the action entitled *Century Oil Company and Others, against Samuel R. McKelvie, et al.,* and that such certified copy is attached hereto and made a part hereof.

I further state that since the rule to show cause was issued in the instant case, one Grant Shumway has been appointed as Secretary of the Department of Agriculture, State of Nebraska, in place and stead of Joseph W. Mayer, and his predecessor, Leo B. Stuhr.

MATTHEW A. HALL.

Subscribed in my presence and sworn to before me this 4th day of April, 1923.

EFFIE COVER,
Notary Public.

[NOTARIAL SEAL]

STATE OF NEBRASKA, }
} ss.
COUNTY OF LANCASTER. }

I, Harry C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that on August 5, 1921, there was filed in my office a petition entitled: *State of Nebraska ex rel. Vincent Jehorek* v. *Samuel R. McKelvie, as Governor of the State of Nebraska,* to require the said Governor to execute a deed in fee simple conveying certain State owned lands in the State of Nebraska to the Relator, and that in due season answer was filed and the Relator replied thereto.

On February 15, 1923, the Relator filed a motion in said action as follows:

> "And now comes said Relator and asks the court for permission to file an amended Petition herein, making said Charles W. Bryan, Governor of said State respondent or defendant herein, because the official term of said Samuel R. McKelvie as Governor of said State has by law

expired and said Charles W. Bryan has succeeded him as such Governor."

And on February 19, 1923, the Court made the following order:

"This cause coming on to be heard upon motion of relator for permission to file amended petition herein, making Charles W. Bryan, Governor, respondent, was submitted to the court; upon due consideration whereof, it is by the court ordered that relator be, and hereby is permitted to file amended petition herein within ten days."

And that on February 26, 1923, Relator filed an amended petition in said action making Charles W. Bryan, as Governor of the State of Nebraska, respondent instead of his predecessor in office and the original defendant, Samuel R. McKelvie.

HARRY C. LINDSAY,
Clerk of the Supreme Court of the
Lincoln, Nebraska, *State of Nebraska.*
April 5, 1923.

[SEAL OF THE SUPREME COURT]

STATE OF NEBRASKA, }
} ss.
COUNTY OF DOUGLAS. }

I, Robert Smith, Clerk of the District Court within and for Douglas County, State of Nebraska, do hereby certify that on September 13, 1922, there was filed in my office a petition by Century Oil Company and others against the Department of Agriculture of the State of Nebraska, Samuel R. McKelvie, Leo Stuhr, and Fred C. Keiner, the object and purpose of which was to have

declared void an Act of the Legislature of Nebraska passed in April, 1917, providing for the collection of fees by the State of Nebraska for inspecting oils, gasoline, etc., and to enjoin the defendant, Samuel R. McKelvie, as Governor, and the defendant, Leo Stuhr, as Secretary of the Department of Agriculture, and Fred C. Keiner, Inspector of the Department of Agriculture from enforcing such law and collecting the fees provided; that the enforcement of the law was by the Act itself placed with the Department of Agriculture and which had been, under such Act, enforcing such law, which plaintiffs in their petition declared to be unconstitutional and void.

That on October 21 and October 23, 1922, answers by the defendants were filed, and on November 18, 1922, reply of plaintiffs was filed. On January 15, 1923, plaintiffs filed a motion as follows:

> "Come now the plaintiffs herein and move the court for an order substituting Charles W. Bryan and Joseph W. Mayer for the defendants, Samuel R. McKelvie and Leo Stuhr, for the reason that the said Charles W. Bryan has been installed in office as Governor of the State of Nebraska, and the said Joseph W. Mayer has been appointed acting Secretary of the Department of Agriculture, and that the said Bryan and the said Mayer are successors of the said McKelvie and the said Stuhr, as Governor and Secretary of Agriculture respectively.
>
> CENTURY OIL COMPANY, ET AL., *Plaintiffs.*
> By CLINTON BROME, *Their Attorney.*"

And on January 20, 1923, there was filed the order of the Court thereon as follows:

"Now, on this 19th day of January 1923, this cause came on to be heard upon the suggestion of the plaintiffs and intervenors, that since the hearing and submission of said cause the defendant, Samuel R. McKelvie had ceased to be Governor of Nebraska and had been succeeded as Governor of said State by Hon. Charles W. Bryan, and that the defendant, Leo Stuhr, had ceased to be Secretary of the Department of Agriculture of said State and that the present acting head of said office is Joseph W. Mayer, Acting Secretary of Agriculture; and upon motion of the plaintiffs and intervenors, it appearing that due notice has been given to the said Charles W. Bryan and Joseph W. Mayer, it is hereby ordered that the said Charles W. Bryan and Joseph W. Mayer be substituted as defendants in place of the said Samuel R. McKelvie and Leo Stuhr, to which said order the defendants except.

Dated at Omaha, Nebraska, this 19th day of January A. D. 1923.

BY THE COURT.
CARROLL O. STAUFFER,
Judge."

That the foregoing quoted motion and order are correct as the same appear upon the records in my office and now on file therein.

ROBERT SMITH,
Clerk of the District Court within and
[COURT SEAL] *for Douglas County, State of Nebr.*

Omaha, Nebraska, April 4, 1923.

BRIEF FOR PLAINTIFFS IN ERROR ON RULE TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED.

I.

STATEMENT.

In 1919 the Legislature of Nebraska enacted into law a Civil Administration Code for the administration of the law, which Code provided that

> "The Civil Administration of the Laws of the State is hereby vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided in the several departments enumerated in Section 2 of this Article."
>
> Session Laws 1919, Title 1, Art. 1, Sec. 1, p. 436.
>
> Compiled Statutes of Nebraska, 1922, Sec. 7242.

Section 2 of the Act created six departments of State Government and among them the Department of Agriculture. (See also C. S. Sec. 7243).

Section 3 of the Act states that

> "To aid the Governor in carrying out the constitutional duties vested in him as the Supreme Executive each department shall have a departmental officer who shall be known as 'Secretary,' who shall, subject to the provisions of this Act, and under the general direction of the Governor execute the power and discharge the duties vested by law in his respective department." (See also C. S., Sec. 7244).

And section 7 provides that "each Secretary of each Department created by this Act shall be appointed by the Governor, by and with the advice and consent of the Senate" (See also C. S. Sec. 7248).

The Act also provides in section 25 that "except as otherwise provided by this Act, each department shall have exclusive supervision, regulation and general control over the enforcement, execution and administration of the laws relating to the several subjects and matters assigned in this Act to the departments respectively." (See also C. S. Sec. 7266).

It will, therefore, be seen that the Governor and the Secretary constitute the "department"; or, in other words, a board for the "economical but efficient and proper enforcement and administration of the laws of the state," in each department. (Session Laws, Sec. 5; C. S., Sec. 7246).

The Legislature of 1921 passed an Act "establishing a standard weight loaf of bread for the State of Nebraska, and providing a penalty," and in the Act stated: "It shall be the duty of the Department of Agriculture to enforce all provisions of this Act."

Session Laws 1921, Chapter 3, p. 57, Sec. 1.
Compiled Statutes 1922, Sec. 7612.

Section 2 of the Act provided for fixed weights of loaves of bread at half-pound, one-pound, and one and one-half pounds, and in exact multiples of one pound, "and of no other weights."

And section 3 stated that

> "A tolerance at the rate of two ounces per pound in excess of the standard weights herein

> fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average *shall not be less than the minimum nor more than the maximum* prescribed by this Act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale." (Italics ours.)

And section 4 provided for fine or imprisonment for violation (See also C. S., Sections 7613, 7614, 7615).

Plaintiffs in error, bakers of, and dealers in bread respectively, claim that such bread law violates Article 1, Section 10 of the United States Constitution, and Section 1 of the Fourteenth Amendment to the Constitution, in that it

(a) Deprives plaintiffs in error and others similarly situated of their liberty and property without due process of law;

(b) Denies to them the equal protection of the law;

(c) Impairs the obligations of contracts;

(d) Abridges their privileges and immunities; and

(e) That fixing a *maximum weight for a loaf of bread*, as well as a *minimum weight* during the twenty-four hours after its baking, is not a proper exercise of the police power of the State, in view of this court's decision in *Schmidinger* v. *City of Chicago*, 226 U. S.

578, and other decisions; and that the law is arbitrary, capricious, unreasonable, oppressive, unwarranted, unworkable, and, therefore, void.

And so claiming, the plaintiffs in error filed suit in the District Court of Lancaster County, Nebraska, for an injunction to restrain Samuel R. McKelvie, the then Governor, and Leo B. Stuhr, the then Secretary of Agriculture, (and then being in charge of the Department of Agriculture) from enforcing the Bread Law.

The injunction was denied and an appeal was taken to the Supreme Court of Nebraska, and on affirmance by that court of the lower court's judgment, the action was brought here by writ of error.

Application was made to this court to substitute Charles W. Bryan and Joseph W. Mayer, as successors in office to Messrs. McKelvie and Stuhr respectively, and on March 19, 1923, your honors ordered a rule to issue to show cause why the case should not be dismissed for lack of authority to substitute the new governor for the ex-governor in view of the decisions in *Irwin* v. *Webb*, 258 U. S. 219, decided March 20, 1922, and *United States* v. *Butterworth*, 169 U. S. 600.

II.

ARGUMENT.

1.

The Department of Agriculture is a continuing body composed of the Governor and Secretary, and is charged with enforcement of the bread law, and thus the abatement rule as to individuals going out of office, does not apply.

In view of the fact that the "Department of Agriculture" is charged with the duty of enforcing the Bread Law, and that such department is composed of the Governor and the Secretary, and is a continuing body, or board, or commission, we submit that the motion to substitute comes within the rule announced in *Irwin* v. *Webb*, 258 U. S. 219, decided March 20, 1922, wherein it is stated (Syll. 4):

> "The rule requiring the abatement of personal suits against public officers upon their retirement from office, and forbidding the substitution of their successors, does not apply when they constitute a Board having continuing existence";

and in the other cases to which reference is made in the opinion.

And inasmuch as the Bread Law involved in this action made it the duty of the Department of Agriculture to enforce all provisions of the Act, through the Governor and the Secretary, the conditions come squarely within the principle announced by Mr. Justice Bradley in *Thompson* v. *United States*, 103 U. S. 480, when he said (page 483):

> "But we cannot accede to the proposition that proceedings in mandamus abate by the

expiration of the term of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. The contrary has been held by very high authority. (Citing cases). We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet, in case of disobedience to the peremptory mandamus, there is no doubt that the officers by whose delinquency it was incurred, would have been liable to attachment for contempt. The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment. (Citing cases).

"And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the

> change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name. The remarks of Mr. Justice Cowen in *People* v. *Collins*, 19 Wend. (N. Y.) 56, are very pertinent to the case, and seem to us sound. That was a mandamus to commissioners of highways who were elected annually; and it was objected that their term would expire before the proceedings could be brought to a conclusion. He said: 'The obligation sought to be enforced devolves on no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners and their successors; and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to form.'"

The charge here is not against either Governor McKelvie nor against Secretary Stuhr, as individuals, but is against them as constituting the Department of Agriculture charged with the enforcement of the law as "it shall be the duty of the Department of Agriculture to enforce all provisions of this Act."

So this action is not within the rule as to individuals announced in *Irwin* v. *Webb*, *supra*, for to again quote Mr. Justice Bradley in 103 U. S. 480, at page 484:

> "The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers

> they were. A proceeding against the government whose officers they were would not lie."

A quite similar case is that of *Murphy* v. *Utter,* 186 U. S. 95. Mr. Justice Brown said (page 103):

> "It is true the Loan Commissioners were not made a corporation by the act constituting the board, but they were vested with power, and were required to perform a public duty; and, in case of refusal, the performance of such duty may be enforced by mandamus, under section 2335 of the Revised Statutes of Arizona of 1887, which provides that 'the writ of mandamus may be issued by the Supreme or District Court to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins.' As, under the act of Congress as well as the territorial act, the board was made a continuing body with corporate succession, the fact that it is not made a corporation by name is immaterial."

The law of mandamus is the same in Nebraska as in Arizona. (C. S. 1922, Sec. 9224. See also *Marshall* v. *Dye,* 231 U. S. 250, 255).

2.

Moreover, the laws of Nebraska authorize substitution of successors in office, and have been so construed by the Supreme Court of the State of Nebraska and the lower courts, and it is the common procedure in such State; therefore the substitution asked for should be granted.

The laws of Nebraska bearing upon the point are found in Compiled Statutes of Nebraska 1922, as follows:

"Section 8541. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"Section 8546. An action does not abate by the death, or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue. In the case of the death or other disability of a party, the court may allow the action to continue by or against his representative *or successor in interest.* In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

"Sec. 8547. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in."

And we believe that we are well within the truth when we say that it has become common practice in the State of Nebraska to substitute as defendant a successor in office in the place and stead of his predecessor, but in the reported cases the direct question has not been passed upon. However, a very strong intimation was given early in the history of the State, in the case of *State* v. *Guthrie*, 17 Neb. 113, that an application to substitute one state officer for his predecessor would be sustained. The action was brought against a city marshal to compel him to perform certain official duties. Thereafter the marshal resigned

from office and pleaded this fact as ground for abatement of the suit. The court sustained this contention, but pointedly said (p. 116):

> "It should be stated that no application has been made to the court to amend the papers in this case so as to make the present incumbent a party, nor has any notice been served on such incumbent to the knowledge of the court. The cause is therefore held to have abated, and its further consideration is dismissed."

The obvious conclusion is that if an application had been made to substitute the successor in office, it would have been granted.

And the trend of the court may be further seen in the case of *Edney, Admx.* v. *Baum*, 2 Neb. (Unof.) 173, 96 N. W. 167, in which case an application was made by an administratrix, successor to a former administrator, to vacate an order of dismissal of the action and reinstate same on the docket. The defense was that letters of administration issued to a prior administrator had been revoked and thus when the action was dismissed there was no administrator in existence to prosecute such action. The court quoted Section 8546 of the Nebraska Statutes, *supra*, which was then substantially as it is now, and held that the applicant was the "successor in interest." The court said:

> "At this time there was no personal representative in existence, at least none which the court, by reason of the record of the Probate Court, would recognize as such. Then, there was no one who could prosecute error from this action of the Trial Court. This being so, the legal remedy is gone. But this does not ex

> tinguish the right of the personal representatives of this estate to have this action tried on its merits. * * * Equity never suffers a wrong without a remedy and whatever may be the merit or demerit of that suit, the personal representatives of this estate have the legal right to have their day in court and the case tried on its merits. This was not done through no fault of theirs."

And in *Tecumseh National Bank* v. *McGee*, 61 Neb. 709, 85 N. W. 949, an administrator sued a debtor of an estate and compromised with the debtor over the objections of one of the heirs, and the latter filed a motion to be substituted for the administrator in the suit and to be permitted to prosecute the action. The substitution was allowed.

A "successor" is one who takes the place of another.

> *State* v. *Andrews*, 64 Kan. 474, 67 Pac. 870, 877.

In *American Surety Co.* v. *Campbell*, 138 Fed. 531, 534, 71 C. C. A. 55, it is said:

> "The term 'successor' in modern acceptation, has a broader significance than succession in respect to the estate of a deceased. It may mean, in a proper situation, succeeding to a place, or right, or an interest, or a power, official or otherwise."

Governor McKelvie and Secretary Stuhr, as the Department of Agriculture, had the "power" to enforce the provisions of the Bread Law herein involved, and now their successors in office have that same power and have precisely the same interest in the

subject matter as had their predecessors, viz: That of enforcing the law; and the successors, Governor Bryan and Secretary Shumway, have taken the places of their predecessors, respectively, in the conduct and management of the Department of Agriculture, and are charged with the same duties, so that manifestly the allegations of the bill can as truthfully be made against the present incumbents of the office as against their predecessors.

But in the unreported cases in Nebraska, we have authority for our contention.

In *State ex rel Jehorek* v. *McKelvie*, filed August 5, 1921, and not yet reported (but the record in which is attached to our showing against the rule) which is an original action in mandamus against Samuel R. McKelvie, as Governor of the State of Nebraska, to compel him as Governor to execute a deed in fee simple conveying certain State lands to the Relator. Governor McKelvie went out of office on January 1, 1923, and on February 15, 1923, the Relator filed a motion to substitute Charles W. Bryan, Governor McKelvie's successor in office, as defendant. The motion was sustained and leave was granted in the following words:

> "This cause coming on to be heard upon motion of relator for permission to file amended petition herein making Charles W. Bryan, Governor, respondent, was submitted to the Court; upon due consideration whereof, it is by the Court ordered that relator be, and hereby is, permitted to file amended petition herein within ten days."

And the amendment was filed and there the action stands at the present time.

And in an action filed in the District Court of Douglas County, Nebraska, by the Century Oil Company and others against Samuel R. McKelvie, as Governor of the State of Nebraska, and Leo Stuhr, as Secretary of the Department of Agriculture and another, an application was filed after January 1, 1923, when Governor McKelvie and Secretary Stuhr had gone out of office, to substitute their successors in office as defendants, viz: Charles W. Bryan and Joseph W. Mayer, and the application was granted and the substitution was made (see certified copies attached to showing).

And may we suggest that the reason for substituting a successor in office as defendant is much stronger in a suit to restrain defendant from enforcing a law claimed to be invalid, than it is in a mandamus suit to compel action by such official.

In the former case, the presumption is that the successor in office will comply with his oath and will enforce the law unless restrained by an order of the court; whereas in the latter case, the successor may take a different view to that held by his predecessor as to what he should do in the particular case, and may perform the act requested without the order of the Court.

And may we further suggest that the reasons for refusing to substitute as given in the reported cases do not apply here. Such reasons are:

1. "Were a demand made upon him (successor in office), he might discharge the duty and render the interposition of the court unnecessary."

2. "If a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor, without any delinquency of his own." (*United States* v. *Butterworth,* 169 U. S. 600, p. 603).

And Mr. Justice Shiras further said in the opinion in that case:

> "Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, *an express or distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred.* Thus it is the personal default of the defendant that warrants the impetration of the writ and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists, only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased." (Page 603).

But here we are not asking that defendants in error be compelled to do something, but that they be restrained from doing something which their oath of office compels them to do, viz: Enforce the law, because that is their duty until the court shall rule

otherwise, and they will not, and should not undertake to decide as to the validity of the law for themselves.

So the same reasons that existed for filing this action against the defendants in error, now exist for the substitution of their successors in office.

And as to those substituted being mulcted in costs, the reason fails when such successors themselves, through their counsel, ask to be substituted, that they may help carry on this action without regard to the result in costs, and so have decided for the guidance of all the states, a question of importance not only to Nebraska, but to the many other states which have enacted Bread Weight Laws.

We respectfully suggest that under the law and the facts of this case, the Rule to show cause should be discharged, and that the successors in office of the defendants in error, and constituting the Department of Agriculture for the State of Nebraska, should be substituted on the record, and this case heard upon its merits in due season.

MATTHEW A. HALL,
CARROLL S. MONTGOMERY,
RAYMOND G. YOUNG,
Solicitors for Plaintiff in Error.

MATTHEW A. HALL,
Of Counsel.

Omaha, Nebraska,
April 5, 1923.

Office Supreme Court, U. S.
FILED
MAR 8 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. [redacted]94

JAY BURNS BAKING COMPANY AND OTHERS,
PLAINTIFFS AND APPELLANTS,

against

SAMUEL R. McKELVIE, AS GOVERNOR OF THE STATE OF NEBRASKA, AND LEO B. STUHR, AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF NEBRASKA, DEFENDANTS AND APPELLEES.

MOTION TO VACATE DISMISSAL, TO REINSTATE ACTION, AND TO SUBSTITUTE PARTIES DEFENDANT AND APPELLEE.

To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Come now the plaintiffs and appellants and respectfully move that the court enter an order vacating the order of dis-

missal heretofore entered on February 19, 1923, and reinstating said cause, and substituting for the named defendants and appellees, their successors in office and present incumbents, Charles W. Bryan, as Governor of the State of Nebraska, and Joseph W. Mayer, as Acting Secretary of the Department of Agriculture of Nebraska, and as reasons therefor state the following facts:

1. That said action involves the right of the Legislature of Nebraska, in the exercise of its police power, to fix a maximum weight for a loaf of bread as well as to fix a minimum weight therefor, and that such action is here by writ of error to the Supreme Court of Nebraska; that similar laws have been passed by some other States, and the question as to the right of the Legislature is a new one and of great importance, not only to the bakers of bread, but also to the consumers of bread throughout the country, and it is desired to have the question settled by a decision of your honorable body.

2. That the action was docketed in the office of the clerk of the Supreme Court on or about August 1, 1922, and on February 19, 1923, such action was dismissed under present Rule 10, for failure of plaintiffs and appellants to furnish the necessary cost of printing the record within ninety days after docketing.

3. That such failure to so furnish such printing costs was owing wholly to the mistake of the solicitor for appellants in relying upon the rules of court as promulgated in 1911 and found in 222 United States Reports, Appendix page 7, and that such solicitor did not know of the amendment to Rule 10 providing for dismissal before the action should be reached for hearing in the event of failure to furnish the

printing costs, all of which will appear from the solicitor's affidavit attached hereto and made a part hereof.

4. That the defendant and appellee, Samuel R. McKelvie, has been succeeded by Honorable Charles W. Bryan, as Governor of the State of Nebraska, and that the defendant and appellee, Leo B. Stuhr, has been succeeded by Joseph W. Mayer, as Acting Secretary of the Department of Agriculture of Nebraska.

5. That the Attorney General and Assistant Attorney General of Nebraska, who represent defendants and appellees, recognizing the importance of the question involved in this action and the very great desirability of having your honorable body pass thereon, join in this application which joinder is in writing and is attached hereto and made a part hereof.

All of which is respectfully submitted.

MATTHEW A. HALL,
CARROLL S. MONTGOMERY,
RAYMOND G. YOUNG,
Solicitors for Plaintiffs and Appellants.

MATTHEW A. HALL,
Of Counsel.

N. Y. draft for printing costs ($580.00) is herewith transmitted to the clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 522. October Term, 1922.

JAY BURNS BAKING COMPANY AND OTHERS, *Plaintiffs and Appellants,*

against

SAMUEL R. MCKELVIE, *as Governor of the State of Nebraska,* AND OTHERS, *Defendants and Appellees.*

Joinder of Defendants and Appellants in Application to Reinstate Action, and for Substitution.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States, Washington, D. C.:

The undersigned, O. S. Spillman, Attorney General, and Charles L. Dort, Assistant Attorney General of Nebraska, Solicitors for Defendants and Appellees, herewith joint with the solicitors for plaintiffs and Appellants in asking your honorable body to set aside the order of dismissal entered on February 19, 1923, and to reinstate said action for the reason that there is involved therein the validity of a law passed not only by the Legislature of the State of Nebraska, but also by the Legislatures of some other States, and it is very desirable that a ruling be had by your honorable body for the guidance of those States and others interested in the question.

And the undersigned also join in the request to substitute as defendants and appellees, the present incumbents in office

and successors to the above-named defendants, and for whom the undersigned appear as solicitors.

And the undersigned consent that the request for vacation of the order of dismissal and for reinstatement and for substitution of parties defendants and appellees may be heard at any time that will suit the convenience of the court and of the solicitors for plaintiffs and appellants.

O. S. SPILLMAN,
Attorney General of Nebraska;
By C. L. DORT,
Assistant Attorney General of Nebraska,
Solicitors for Defendants and Appellees.

LINCOLN, NEBRASKA, *March* 3, 1923.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 522. October Term, 1922.

JAY BURNS BAKING COMPANY AND OTHERS, *Plaintiffs and Appellants,*

against

SAMUEL R. MCKELVIE, *as Governor of the State of Nebraska,* AND LEO B. STUHR, *as Secretary of the Department of Agriculture of Nebraska, Defendants and Appellees.*

Affidavit in Support of Motion to Vacate Dismissal and to Reinstate Said Action and to Substitute Parties Defendant and Appellee.

STATE OF NEBRASKA,
County of Douglas, ss:

Matthew A. Hall, being first duly sworn according to law, says that he is one of the solicitors for plaintiffs and appellants, and that he has had sole charge of said action for his firm, Montgomery, Hall & Young, of Omaha, Nebraska; that the record in said action was filed with the clerk of the United States Supreme Court and the action was docketed therein on August 1, 1922, and that affiant was advised that owing to the congestion of cases upon the docket, hearing would not likely be had in above action before the fall of 1923;

That affiant relied upon the rules of the Supreme Court as promulgated in Volume 222, U. S. Reports, Appendix, page 7, and did not know of the amendment to rule 10 providing for dismissal before the time it should be reached for hearing in the event that the printing costs should not

be paid; that immediately after August 1, 1922, affiant left his home on a vacation, but was called back about September 1 by illness in his family, and this, with the accumulated work, and also an unusual amount of new business, distracted affiant's attention from above action; that during the present winter affiant has suffered more or less from an attack of the flu and has not been able to give his usual attention to his law practice;

That affiant first learned on February 27, 1923, of the entry of dismissal on February 19, 1923, and at once took the matter up with his clients and with the Attorney General of Nebraska, and his assistant, and has at the earliest moment filed a motion to reinstate said action; that affiant can only hope for the court's leniency because of affiant's ignorance of the present rule, and also because of the unusual circumstances—illness, and plethora of work—which prevented earlier attention to this action, which attention would undoubtedly have disclosed to affiant his violation of the rule in time to have made the necessary application and showing under the rule before the dismissal was entered; that the failure to remit costs was not a purposeful act made for any delay, but was occasioned wholly by the facts and under the circumstances stated.

MATTHEW A. HALL.

Subscribed in my presence and sworn to before me this 5th day of March, 1923.

[Notarial Seal of Effie Cover, Douglas County, Nebraska.]

EFFIE COVER,
Notary Public.

Commission expires Jan.20, 1925.

[Endorsed:] Docket No. 522. October Term. In Supreme Court of the United States. Jay Burns Baking Company, and Others, Plaintiffs & Appellants, *vs.* Samuel R. McKelvie, as Governor, and Others, Defendants & Appellees. Motion to vacate dismissal—affidavit in support—joinder of solicitors for defendants. Matthew A. Hall, Carroll S. Montgomery, Raymond G. Young, 624 Omaha National Bank Bldg., Omaha, Attorneys for Plaintiffs and Appellants.

[Endorsed:] File No. 29072. Supreme Court U. S., October Term, 1922. Term No. 522. Jay Burns Baking Co. *et al.*, Appellants, *vs.* Samuel R. McKelvie, Governor, *et al.* Motion to reinstate cause and consent thereto. Filed March 8, 1923.

Office Supreme Court, U. S.
FILED
OCT 4 1923
WM. R. STANSBURY
CLERK

Number 94.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

JAY BURNS BAKING COMPANY AND OTHERS,
PLAINTIFFS IN ERROR,

V.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND OTHERS,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PLAINTIFFS IN ERROR.

MATTHEW A. HALL,
RAYMOND G. YOUNG,
CARROLL S. MONTGOMERY,
Counsel for Plaintiffs in Error.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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Number 94.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

JAY BURNS BAKING COMPANY AND OTHERS,
PLAINTIFFS IN ERROR,

V.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND OTHERS,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

Nature of the Case.

(T refers to Transcript of Record.)

The Legislature of the State of Nebraska, in the year 1921, enacted into law what is commonly known as the Smith Bread Bill, and which is in terms as follows:

SMITH BREAD LAW.

(Introduced by E. A. Smith of Douglas County)

"AN ACT establishing a standard weight loaf of bread for the State of Nebraska and providing a penalty.

Be It Enacted By the People of the State of Nebraska:

Section 1. Department of agriculture to enforce. It shall be the duty of the Department of Agriculture to enforce all provisions of this Act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this Act.

Sec. 2. Bread, standards of weight. Every loaf of bread made or procured for the purpose of sale, sold, or exposed or offered for sale in the State of Nebraska shall be the following weights avoirdupois, one-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

Sec. 3. Tolerance, how determined. A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not be less than the minimum nor more than the maximum prescribed by this Act. All weights shall be determined on the premises where bread is manufactured or baked and shall

apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale.

Sec. 4. Penalties for violation. Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days. Provided, however, that upon the second and all subsequent convictions for the violation of any of the provisions of this Act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days.

Approved March 31, 1921"

Session Laws of Nebraska, 1921, Chap. 2, p. 56.

Compiled Statutes of Nebraska, 1922, Sections 7613 to 7616.

Plaintiffs in error, some of whom are bakers of bread and others of whom are dealers in bread in the State of Nebraska, conceiving that the Smith Bread Law was and is invalid, filed suit in the District Court of Lancaster County, Nebraska, for themselves and all others similarly situated, to enjoin the defendants from enforcing the law.

BILL IN EQUITY.

The bill sets forth the business and capacity of each plaintiff and the official capacity of each defendant, and the enactment of the Smith Bread Law, and its threatened enforcement by defendants, who are under the law, vested with enforcement.

That under such law it is made a crime to make or expose for sale, or to sell loaves of bread weighing re-

spectively less than 8, or more than 9 ounces, being the half-pound loaf, or less than 16, or more than 18 ounces, being the one-pound loaf, or less than 27 ounces, being the one and one-half pound loaf, or multiples of the one-pound loaf with proportionate toleration.

That for many years the popular loaves with the consuming public in Nebraska and surrounding states were loaves retailing at 10c and 15c each respectively, and that the weights thereof and of all other loaves made by the bakeries have for years fluctuated in accordance with the market price of the ingredients contained in the loaves, the quality of the loaves remaining the same all the time, and that the minimum weight of each loaf is stamped upon the wrappers of all wrapped bread.

That no dissatisfaction has ever been expressed by the bread-buying public with such arrangement and plan, the public demand being principally for a high quality of bread rather than for any given weight or size of loaf, and that the public demand for standard and quality has been met and maintained by the bakers under such plan of reducing or increasing the weight and size of each loaf as the prices of the ingredients used in making the bread should increase or decrease on the market, and that there never has been, and is not now any demand by the bread-buying public of Nebraska for a fixed weight or size of loaf of bread;

That it is not possible from the nature of bread to standardize its quality, and that many or few ingredients enter into the manufacture of bread according to the judgment of each baker, which in turn depends upon the demands of his customers;

That the dough from which bread is baked contains from 37% to 45% of moisture which evaporates more or less in the baking process, and also during 24 hours after the bread is baked, depending upon many varying conditions; that after the dough is mixed it is allowed to ferment, and that to obtain the best results, the dough must at a given period of fermentation be placed in the baking oven without regard to the temperature of the oven at such time, and that it is not possible to maintain a uniform heat in all parts of the oven, either when the loaves are being inserted therein, or when they are being baked, and that the evaporation of moisture is more or less influenced at all times by the temperature of the ovens and of the atmosphere in the various rooms where the process of baking is carried on, and where the bread is kept after baking, and also is influenced by the humidity in the air and by the natural conditions which are entirely beyond the control of the baker; that because of the arrangement of baking ovens, some of the loaves are baked for a longer period than others during the baking process, which variation in turn affects the evaporation of the moisture, and that because of all such variable and uncertain conditions of the dough and in the baking of the bread, and in order to obtain a loaf weighing not less than one-pound at any time within 24 hours after its baking, it is thus necessary to insert in the oven a sufficient weight of dough to meet all such uncertain conditions and to allow for the evaporation of moisture which may take place both in the oven during the baking process and for 24 hours thereafter; and that at all times in order to have not less than the minimum weight loaf, such loaf may weigh several ounces more than such minimum owing to the uncertain conditions beyond the control of the baker;

That the weight of the moisture evaporated during the baking process, and for 24 hours thereafter, will vary from one-half ounce to 3 ounces, or more, in a 19 ounce unit of dough, and that under the modern process of bread baking it is absolutely impossible for the baker to predetermine the quantity of dough which must be scaled and inserted in the oven to produce a loaf of bread which will, after baking, and for 24 hours thereafter, under any and all varying conditions, weigh not more than 18 ounces, and not less than 16 ounces to the pound;

That the decrease in the weight of the baked loaf is caused by evaporation of moisture, but that such moisture does not affect the food value of the baked loaf, which food value remains the same irrespective of the evaporation of moisture and consequently of the decrease in the weight of the loaf;

That under the plan of graduating the weight of the loaf in accordance with the fluctuation of the market prices of ingredients, the standard prices of 10c and 15c per loaf, have practically been maintained and have thus become more or less fixed and stabilized and the quality of the bread has been preserved and the buying public has thus shared ratably in the increase or decrease in the market prices of ingredients without deterioration in the quality of the bread; but that under the Smith Bread Law, should the cost of the ingredients increase but a fraction of a cent, in order to meet that increase the price to the consumer of bread must of necessity be raised a full cent because the cent is the lowest unit of money in circulation, and the baker and dealer will thus make more than a normal profit and the public will

pay more than it should pay, and the Smith Bread Law, if enforced, will thus be detrimental to the interests of the bread consuming public; and the same result will accrue to the public by a reduction of less than a cent in the price of the ingredients entering into the manufacture of bread;

That because of the standard prices of 10c and 15c per loaf respectively, according to size, bakers will, under the Smith Bread Law, be obliged to lower the quality of bread upon an increase in the price of the ingredients in order to maintain the usual margin of profit and thus such law will again in its operation be detrimental to the bread-buying public;

That under the operation of the Smith Bread Law, bakers outside of the State of Nebraska will be able to market any weight loaf with impunity in quantities of less than 25 loaves, because of the impossibility of enforcing the law as to such bakers, and as to dealers handling their product; and that the average shipment to one customer by such outside bakeries is less than 25 loaves of any one weight, and as a necessary consequence the Nebraska bakers will be penalized where the outside bakers and those dealers handling their bread will go scot free;

That owing to the exigencies of the business the products of the larger bakeries do not reach the consuming public until 12 or more hours have elapsed after the baking process, and that consequently much evaporation of the moisture has taken place, whereas the smaller bakers, who are numerous throughout the state, sell their bread across the counter direct to the consumer

almost immediately after baking and before much evaporation has taken place; and therefore, a discrimination is brought about under the Smith Bread Law in favor of the smaller and retail bakers and against the larger and wholesale bakers;

That the twin, or multiple loaf, is in great demand by the bread-buying public, and that the one and one-half pound twin loaf has met with the most public favor and is the most economical, both for the baker and the consumer and, while the loaf consists of two units, it is sold as a loaf; that units of a one-half pound are so small that they dry out in the baking process and afterwards, and evaporate the moisture much more rapidly than do larger units, and that the cost of baking a one-pound twin loaf, composed of two half-pound units, is practically the same as the cost of baking a one and one-half pound twin loaf composed of two three-quarter pound units; that for commercial purposes anything larger than a one and one-half pound twin loaf is too large and that half pound units are too small, and that under the Smith Bread Law, the business in twin loaves will be lost as 80 per cent of the business done in twin loaves is in loaves of one and one-half pound weights, each unit of which is three-fourths pound or 12 ounces, or as near thereof as possible;

That various of the plaintiffs have spent much money covering quite a period of time in perfecting their plans to make twin loaves of bread and in building up a business therein and the result of which will be nullified by enforcement of the Smith Bread Law;

That the plaintiffs and those engaged like them will be deprived of the benefit of a large business with the

railroads and restaurants because of the demand for certain sizes and weights of loaves heretofore created and which are different from the weights specified in the Smith Bread Law, and that the plaintiffs and others similarly engaged will not be able to compete with competitors outside the State of Nebraska by reason of the restrictions in the Smith Bread Law, and will thus suffer constant loss by the enforcement of such law, and that to endeavor to comply with such law, will require the expenditure of a large amount of money in the equipment of the various bakeries;

That the Smith Bread Law violates Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

> "No state shall make or enforce any law which shall * * * deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law,"

and is also violative of similar provisions in Section 3, Article 1 of the Constitution of the State of Nebraska, and of Article 1 of the Bill of Rights; that such Smith Bread Law will, if enforced, deprive the plaintiffs and each of them and others similarly situated of their liberty and of their property without due process of law, and that it also denies to the citizens of the State of Nebraska, the equal protection of the law and their constitutional freedom of contract, and that such law was not enacted pursuant to a proper exercise of the police power of the state, and that it has no relation whatever to the public welfare, health or safety, but is contrary and adverse thereto, and that it is an arbitrary,

unreasonable, oppressive and unwarranted interference with the constitutional rights and privileges of the plaintiffs, all done under the guise of police regulation.

The petition further states that the plaintiffs have no adequate remedy at law in the premises and that the enforcement of the Smith Bread Law will entail a multiplicity of suits at consequent large expense to the plaintiffs and to other litigants, and that such plaintiffs and others like them will sustain irreparable injury and damage to their business and property and therefore ask that the defendants be enjoined from enforcing the provisions of said Smith Bread Law.

ANSWER.

The answer of the defendants admits the official capacity of such defendants, and the enactment of the Smith Bread Law, and that violations of such law may result in criminal prosecution of the violators, and that the minimum weight is stamped upon wrapped bread;

Defendants further state that plaintiffs have a full and adequate remedy at law and that, under the Constitution, no statute will be held unconstitutional, except by the concurrence of five judges, and that the judges of the Supreme Court shall hear and determine all cases involving the constitutionality of the statute and that the District Court is without jurisdiction to pass thereon; and defendants deny generally all other allegations of the petition and ask that the action be dismissed.

REPLY.

The reply of plaintiffs admits that no legislative act will be held unconstitutional by the Supreme Court, ex-

cept by the concurrence of five judges thereof, and that the court, sitting without division, shall hear and determine all such cases, and then denies generally all other allegations in the answer.

II.

THE ISSUES.

1.

Does the Smith Bread Law, in fixing a maximum weight loaf, contravene the "due process" clause of the Federal and State Constitutions?

2.

Is the *maximum* weight loaf provision within the police power of the state?

3.

Does such law violate the constitutional right of citizens to enter into private contracts?

4.

Does such law deny to our citizens the equal protection of the law?

5.

Is such law in its maximum weight provision arbitrary, capricious, unreasonable, oppressive, unwarranted and unworkable and therefore void?

III.

HOW THE ISSUES AND CASE WERE DECIDED.

The District Court of Lancaster County, Nebraska, after preliminary hearing, granted a temporary injunction against the enforcement of the law, but on the final hearing dissolved such temporary injunction and held the law to be valid and not in violation of the United States and Nebraska Constitutions, and dismissed the action; and on appeal to the Supreme Court of Nebraska the decree of the lower court was affirmed and plaintiffs have prosecuted error proceedings to obtain a review of the case in this court.

IV.

SPECIFICATION OF ERRORS.

The Supreme Court of Nebraska erred in holding and deciding:

1.

That the Smith Bread Law, and especially said Sections 2 and 3 thereof, are not contrary to, and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2.

That the Smith Bread Law and especially Sections 2 and 3 thereof, do not deprive plaintiffs in error and others similarly situated, of their liberty or property without due process of law.

3.

That the Smith Bread Law and especially Sections 2 and 3 thereof, do not deny to plaintiffs in error and

others similarly situated within the jurisdiction, the equal protection of the law.

4.

That the Smith Bread Law and especially Sections 2 and 3 thereof as applied to these plaintiffs in error and others similarly situated, do not impair the obligation of contracts.

5.

That the Smith Bread Law and especially Sections 2 and 3 thereof, do not abridge the privileges and immunities of citizens or of the plaintiffs in error as guaranteed by the Fourteenth Amendment to the Federal Constitution.

6.

That the Smith Bread Law is valid and that plaintiffs in error are not entitled to the injunction prayed for in the bill.

V.

FACTS.

Plaintiffs in error are either manufacturers of, or dealers in, bread in Nebraska. It is not possible for them day in and day out, under the constantly changing natural conditions of the atmosphere, to comply with the Smith Bread Law, and particularly with the *maximum* weight feature, as it is impossible to predetermine the amount of dough necessary for each loaf so as to know when the dough is divided that twenty-five or more of the baked loaves will, when they leave the oven, average

not more than 18 ounces to the pound, and also twenty-four hours thereafter average not less than 16 ounces to the pound.

This is so because of the very many and uncertain and varying conditions surrounding the making of a loaf of bread. Some of these conditions are set forth in the transcript of record (T. 26, 27, 36, 44, 45, 46, 49, 50, 55).

In breadmaking water and other liquids are mixed with flour and the best flours require the greatest amount of moisture (T. 20, 31, 43, 45, 46).

Consequently when bread leaves the oven there is more or less moisture in it, depending upon the quality of the bread, and by evaporation of the moisture the bread becomes dry; but such evaporation of moisture, both in proofing the dough, in baking the loaf, and also after baking, is beyond the control of the baker, because it is dependent upon the heat conditions and the humidity prevailing in the dough room, the oven, and the room or rooms where the bread may be kept for the twenty-four hours after baking, be it in the bakery, or in the dealer's shop, or in the home of the consumer (T. 21, 36, 43, 44).

A poor quality of bread, or bread made from a poor quality of flour contains the least moisture and hence has the least evaporation, and, therefore, comes nearer to the toleration conditions imposed in the Smith Bread Law (T. 21, 29, 31, 37, 41, 44); and thus the best bread will have the greatest evaporation of moisture in a given time and will at times, in spite of all that the baker can do, exceed the toleration imposed by the Smith Bread Law (T. 21, 29, 31). Poor bread is not economical be-

cause it lacks in protein, which is one of the essential elements for a balanced ration and, therefore, with poor bread, one must eat more expensive foods to obtain the same amount of nutritive material gotten from good bread alone (T. 21).

And poor bread is less appetizing than good bread and less palatable. So a less quantity is eaten and other and more expensive foodstuffs must be consumed with poor bread, thus raising the cost of living to the consumer of such bread (T. 21).

It is utterly impossible for the baker at all times and under all climatic conditions, to make palatable bread which for twenty-four hours after baking will comply with the maximum feature of the Smith Bread Law (T. 23, 29, 33, 39, 41, 43, 45, 46, 47, 50, 52, 53, 54).

However, something partaking of the nature of bread might be made to comply with the Smith Bread Law, but the product would not be salable, as people are accustomed to get good bread and demand same (T. 25, 28, 35).

Good bread may be overweight when fresh, or underweight at the end of twenty-four hours after baking, or it may be both over and under at the respective periods (T. 25, 29, 36).

Starch cells in dough must be ruptured to get the best bread, and the rupturing process requires moisture and heat, so that the poorer the flour and the poorer the quality of the bread, the less is the moisture in the bread, and consequently there are more unruptured cells which are indigestible (T. 29).

But whether a loaf of bread be dry or moist, its food value is the same, so that evaporation of several ounces of moisture from a pound loaf of bread does not diminish the food value of the bread (T. 21, 31, 37).

There is no article of diet which has such uncertainty surrounding its making as has bread. It is in a class by itself (T. 30, 38, 44).

No other foodstuffs in the state of Nebraska than bread, are required by law to have both a *minimum* and a *maximum* weight within a given period of time (T. 30).

Many shipments of bread are made by the bakers to dealers in less quantity than twenty-five loaves of one unit; and a great deal of bread is shipped into Nebraska from other states in quantities less than twenty-five loaves of one unit, as the public demands fresh bread, and a purchase by a dealer of too much bread at one time, might mean a loss by reason of the bread becoming stale on his hands (T. 30).

VI.

PROPOSITIONS OF LAW.

1.

Laws fixing specific weights for loaves of bread are construed to be *only against short weights*, and do not prohibit greater weights than the standards provided.

People v. *Wagner*, 86 Mich. 549, 49 N. W. 609.
State v. *Huber*, 4 Boyce (Del.) 259, 88 Atl. 453.
Allion v. *City of Toledo*, 99 Ohio St. 416, 124 N. E. 237.

Chicago v. *Schmidinger,* 243 Ill. 167, 90 N. E. 369.

Chicago v. *Schmidinger,* 226 U. S. 578.

City of Chicago v. *Schweifurth,* 174 Ill. App. 64.

2.

The same rule is true in regard to other articles.

Spokane v. *Arnold,* 73 Wash. 256, 131 Pac. 815.

State v. *Co-Operatice Store Co.,* 123 Tenn. 399, 131 S. W. 867.

3.

The law fixing a maximum as well as a minimum weight for a loaf of bread is illegal and invalid.

Harwood v. *Williamson,* 1 Sask. Law Reports 66 (Canada).

4.

Dangerous articles are subject to regulation by law, where harmless articles are exempt.

Williams v. *Walsh,* 79 Kan. 212, 98 Pac. 777.

Williams v. *Walsh,* 222 U. S. 415.

5.

There must be some logical connection between the object sought to be accomplished by the law and the means prescribed to accomplish the end.

Chicago v. *C. & N. W. Ry. Co.,* 275 Ill. 30, 113 N. E. 849, 851.

C. B. & Q. R. Co. v. *State,* 47 Neb. 549, 66 N. W. 624.

6.

The right to contract is property.

Taylor, Due Process of Law, Sec. 265, pp. 490, 491.

State v. *Goodwill*, 33 W. Va. 179.

Braceville v. *People*, 147 Ill. 66.

7.

Laws enacted under the guise of police regulation must have some relation to the public health, welfare or safety.

Smiley v. *McDonald*, 42 Neb. 5, 13, 60 N. W. 355.

Wenham v. *State*, 65 Neb. 394, 402, 91 N. W. 421.

Union Pacific Ry. Co. v. *State*, 88 Neb. 247, 251, 129 N. W. 290.

State v. *Withnell*, 91 Neb. 101, 104, 135 N. W. 375.

Urbach v. *City of Omaha*, 101 Neb. 314, 316, 163 N. W. 307.

Mugler v. *Kansas*, 123 U. S. 623.

8.

The regulation must not be an arbitrary and unreasonable interference with the rights of individuals.

In re Anderson, 69 Neb. 686, 689, 96 N. W. 149.

Lawton v. *Steel*, 152 U. S. 133, 137.

Connecticut Co. v. *Town of Stamford*, 110 Atl. 554.

9.

Police power means the power of the state to prohibit all things hurtful to the comfort, safety or welfare of the community.

In re License Cases, 5 Howard (U. S.) 504, 583, per Taney, C. J.

10.

The police power does not justify an enactment merely because there is a possibility of danger which it is sought to avert.

Ex parte Whitewell, 98 Cal. 73, 32 Pac. 870.
Freund Police Power, Section 494.

11.

Giving additional articles as a premium to the purchaser is valid.

State v. *Sperry*, 94 Neb. 785, 114 N. W. 795.
Young v. *Commonwealth*, 101 Va. 853, 867.
State v. *Ramseyer*, 73 N. H. 31, 58 Atl. 958.

12.

If an invalid portion of an act formed an inducement to the passage of the act, the whole act will be declared invalid.

Trumble v. *Trumble*, 37 Neb. 340, 55 N. W. 869.
State v. *Poynter*, 59 Neb. 417, 81 N. W. 431.
State v. *Junkin*, 85 Neb. 1, 122 N. W. 473.

13.

The Constitution is violated when persons engaged in the same business are subjected to different restrictions.

Soon Hing v. *Crowley*, 113 U. S. 703, 709, 5 Sup. Ct. 730.

Louisville & N. R. Co. v. *Bosworth,* 230 Fed. 191, 207.

Standard Oil Co. v. *Red River Parish Police Jury,* 140 La. 42, 47, 72 So. 802.

Black v. *State,* 113 Wis. 205, 89 N. W. 522, 528.

In re Von Horne, 74 N. J. Eq. 600, 70 Atl. 986.

14.

A law palpably unreasonable and arbitrary and exceeding all reasonable classification, is not within the police power of a state.

Price v. *People,* 238 U. S. 446.

Meyer v. *State of Nebraska,* 67 L. Ed. U. S. 698.

Mugler v. *Kansas,* 123 U. S. 623, 661.

15.

Determination by the legislature of what constitutes proper exercise of police power is not final nor conclusive, but is subject to supervision by the courts.

Meyer v. *State of Nebraska,* 67 L. Ed. U. S. 698.

Mugler v. *Kansas,* 123 U. S. 623.

16.

The business of baking is not clothed with a public interest.

Wolff Packing Co. v. *Court of Industrial Relations,* 67 L. Ed. U. S. 756.

17.

Freedom of contract is the general rule, and restraint is the exception; and restraint can only be justified by exceptional circumstances.

Adkins v. *Children's Hospital,* 67 L. Ed. U. S. 440.

State v. *Edgecomb,* 108 Neb. 859, 864, 189 N. W. 617.

18.

Only public necessity can justify the exercise of the police power by a state.

C. B. & Q. R. Co. v. *Drainage Commission,* 200 U. S. 561.

State v. *Edgecomb,* 108 Neb. 859, 189 N. W. 617.

People v. *Klinck,* 214 N. Y. 121, 101 N. E. 278.

12 Corpus Juris 909.

19.

The constitutionality of a law may depend upon the result of its practical operation.

Erickson v. *Nine Mile,* 109 Neb. —, 192. N. W. 694.

VII.

ARGUMENT.

BRIEF OF THE ARGUMENT.

1.

The Smith Bread Law is contrary to, and is in violation of, the Federal and State Constitutions prohibiting laws depriving persons of liberty and property without due process of law, and laws denying the equal protection of the law, and laws abridging the privileges and immunities of citizens and denying freedom of contract.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And Section 3, Article 1, Constitution of Nebraska provides:

> "No person shall be deprived of life, liberty, or property without due process of law."

Section 10, Article 1 of the Constitution of the United States provides:

> "No state shall * * * pass any * * * law impairing the obligation of contracts."

The Smith Bread Law fixes not only a *minimum* weight for a loaf of bread, but also fixes a *maximum* weight when baked and during the twenty-four hour

period thereafter. The loaf must not, during that time, exceed the maximum, nor fall below the minimum, at peril of fine and imprisonment for the baker and for the dealer who handles his goods.

Plaintiffs have no quarrel with the *minimum* feature of the law, but they do most earnestly contend that the *maximum* feature is a violation of their constitutional rights and privileges.

Bread laws fixing a minimum weight loaf have been upheld by various courts, but we call especial attention to the fact that without exception such laws were sustained because they were stated to be *against a short weight loaf;* and in none of them is there any intimation that a *maximum* weight loaf would be within the police power of the state to establish. The decisions upholding bread laws pointedly refer to the important feature in those laws, which is the prevention of the sale to the consuming public of loaves of less weight than they purport to be; and that being so, such laws constitute a proper exercise of the police power of the state.

In *Mayor of Yuille*, 3 Ala. 137 (1841), an ordinance of the City of Mobile required a loaf of bread to be "of such weight as shall be from time to time prescribed." The weight was fixed under such ordinance and a baker was fined because "a quantity of bread made by him for sale" was condemned for being *of less weight* than required by the proclamation of the mayor. But there is no suggestion in the decision that if the baker had made and sold bread *of greater* weight that it would thus have been illegal.

In *Guillotte* v. *City of New Orleans*, 12 La. Ann. 432 (1857), the court says:

> "The 5th section (of the ordinance) which authorizes * * * certain police officers to enter any bake house * * * where bread is kept * * *, and in case it (the bread) is *wanting in weight*, * * * to conduct the offender before the recorder * * * is no violation of the Constitution."

In *People* v. *Wagner*, 86 Mich. 594, 49 N. W. 609 (1891), it is said:

> "An ordinance of the City of Detroit provides that bread shall be manufactured into loaves of 'one pound, two pounds, and four pounds (and no other) avoirdupois weight' and that no baker shall sell or expose for sale bread that shall be 'deficient in weight.' Held, that the ordinance does not prohibit the sale of bread *where the loaves overrun the regulation weight*, nor the exaction of an increased price by reason of the overweight."

In *State* v. *Huber*, 4 Boyce (Del.) 259, 88 Atl. 453 (1913), the statute provided that any person selling or offering to sell a loaf of bread "*that shall weigh less than one pound* avoirdupois weight * * * shall be guilty of a misdemeanor." Defendant was indicted for violation of the statute. The court says:

> "The Act of June 1, 1898, * * * prohibiting the sale of bread by the loaf *weighing less than one pound avoirdupois*, is a proper exercise of police power, and not unconstitutional for unreasonableness, as abridging the privileges and immunities of citizens."

In *Allion* v. *City of Toledo*, 99 Ohio St. 416, 124 N. E. 237 (1919), an ordinance provided that bread could be

sold only in loaves weighing "one pound, one and one-half pound, two pounds, two and one-half pounds, three pound, three and one-half pound, four pound, four and one-half pound, five pound, five and one-half pound, or six pound loaves *and in no other way.*" Defendant was convicted of selling bread weighing less than the weight fixed. The court construed such law as fixing a minimum only, but *did not fix a maximum*, as the court says:

> "In prescribing the standard one pound loaf *as the minimum* which could be manufactured and sold by the baker, this court cannot say that the fixing of that standard in the exercise of legislative discretion by the council, was so unreasonable and arbitrary as to require judicial interference," although the ordinance under consideration stated that "if any person * * * shall make or * * * sell, offer, or expose for sale, within the City of Toledo, any standard loaf or loaves of bread *which do not weigh one pound each* * * * shall be fined * * *."

In *City of Chicago* v. *Schmidinger*, 243 Ill. 167, 90 N. E. 369, the ordinance provided that bread should be sold in loaves of one pound avoirdupois, and "in half, three-quarter, duplicate, triple, quadruple, quintuple, or sextuple loaves *and in no other way.*" The court says:

> "There is nothing in the ordinance which limits the weight of a loaf to a pound or the fractional part of a pound or the multiple of a pound. The *ordinance was passed with a view only to prevent the sale of loaves of bread which were short in weight.*"

The court thus construed the ordinance to mean that giving an excess amount of bread in the loaf to the purchaser would not be a violation of the ordinance, but only skimping the loaf would be considered such violation.

The same construction of the ordinance was taken by this court in affirming the decision of the Illinois Supreme Court in 226 U. S. 578, where Justice McKenna, who wrote the opinion says:

> "To the argument that to make exactly one pound loaves is extremely difficult, if not impractical, the Supreme Court of Illinois has answered and this construction is binding upon us, that the ordinance is not intended to limit the weight of a loaf to a pound, or the fractional part, or multiple of a pound, *but that the ordinance was passed with a view only to prevent the sale of loaves of bread which are short in weight.*"

The Chicago ordinance was again in question in the case of *City of Chicago* v. *Schweinfurth*, 174 Ill. App. 64, and it was held that the ordinance was not violated where "loaves labeled as three-quarter pound all exceed that weight and some exceed one pound."

It will thus be noted that while the Chicago ordinance did not in words fix a maximum for the loaves yet it did in effect do so, because it stated that the loaves should weigh one pound, or fractional part or multiples of a pound, *neither more nor less*, and so the maximum was fixed for such loaves; but the court held that it would construe the law to mean that there was no maximum, and therefore a loaf labeled as twelve ounces might for that matter exceed a pound in weight and presumably the court so held on the theory that the purchaser who asked for and was buying a twelve ounce loaf of bread, was not injured in any way, but rather was benefited, when he got more than such twelve ounces of bread; and this of course is so perfectly obvious and plain that it is useless to enlarge upon it.

There are some other cases involving the same principle, but with reference to other articles than bread. For instance in *Spokane* v. *Arnold*, 73 Wash. 256, 131 Pac. 815, a law provided that unlabeled butter should only be sold in one pound net packages, and the court construed the law to mean that it was only "unlawful to sell packages *short in weight*."

In *State* v. *Co-Operative Store Co.*, 123 Tenn. 399, 131 S. W. 867, the weight of a bushel of cornmeal in sack had been fixed by law at precisely 48 pounds, but did not prohibit a sale in bulk when priced and delivered by actual weight or measure. The court says that the "object of the statute *is to prevent short weight in packages.*"

But nowhere that we can find, has a court decided that a law prohibiting a manufacturer or a dealer from giving *more* than the customer asks and pays for will be upheld as being a proper exercise of the police power of the state; and it is perfectly clear that inserting a maximum weight of loaf in the Smith Law will not prevent fraud upon the bread purchaser or consumer, because there can be no fraud; for with a *minimum* weight fixed for a half pound loaf at eight ounces and one pound loaf at sixteen ounces, and one and one-half pound loaf at 24 ounces, fraud cannot be perpetrated in bread any more than it can be in the thousand and one other articles of foodstuffs on the market.

The only decided case similar to the one now before this court is found in *Harwood* v. *Williamson*, 1 Sask. Law Reports 66, decided January 21, 1908. There the provincial law authorized municipalities to pass ordinances or by-laws for "Regulating Assize of Bread," and

this court held that the word "Assize" meant "The power * * * of * * * adjusting the weight or measure of bread."

The City of Regina passed a by-law providing "that the assize of bakers bread for this town shall be the loaf weighing four pounds, and the half weighing two pounds, and no persons shall sell or dispose *of any loaf of any other size or weight.*"

In construing that by-law the court says:

> "It is urged, as stated before, that under such a provision a person who sells a loaf weighing *more* than four, or two pounds, as the case may be, is liable to the penalty provided. *Now unquestionably if that were correct, I should have no hesitation in holding the by-law unreasonable.* But I am of the opinion that this is not correct. Statutory provisions have been in force for a very great length of time, both in England and in Canada, regulating the assize of bread, and the intention of all of them is clear; that is, to provide that bread sellers shall give *a quid pro quo* in receiving money for bread, and shall not sell *under weight, nor sell a light loaf.* * * * No legislation has ever attempted or sought to make a person liable to a penalty *for giving more bread than the specified weight.* In view of what the evil is, and what the legislature proposed to remedy, I see no difficulty in construing this enactment. It is a well-known rule for construing a statute to inquire first what the evil is that the legislature has attempted to remedy, and then to apply the statute to that purpose if apt words are used for the purpose."

So while the court construed the by-law as being one only against *short weight*, the court did say that if such by-law could be construed to prohibit making *over weight* loaves, that the court would "have no hesitation in hold-

ing the by-law unreasonable"; and that is the contention made by the plaintiffs here in regard to the Smith Bread Law. It is not shown in evidence, and it cannot be shown, that the manufacture or sale of loaves of bread weighing more than the minimum prescribed is detrimental to the public interest; but on the other hand it is shown very conclusively not only that a maximum weight loaf of bread is impossible of making on all days and in all seasons, but it is also shown that such a law is against the best interests of the consuming public and is positively detrimental.

Dr. Harry Snyder, connected with the United States Department of Agriculture, testified:

> "In bread making, water is necessary, the amount being governed by the kind of flour used. In the low glutin flour a minimum of water is required, and in a high glutin flour more water is required. Glutin is the material which gives the bread-making value and is included in the term protein. So flours which have the largest amount of glutin make the best bread or that which has the highest food value" (T. 20).

> "The more water there is in a dough, the greater the evaporation, and the greater the variation in weight between the dough and the finished product. In making bread from a high glutin flour, the baker must use about 60% of water in mixing the dough. The baker does not know of the moisture content in flour as it varies with quality and conditions in the place where the flour is kept. Low glutin flour, or low quality flour, does not take the high absorption of water and a poorer quality of bread results than from the high glutin or better grades of flour. The best flour requires more water than the poorer grades of flour" (T. 20-21).

"In baking bread there is a number of uncontrollable elements. On account of the gas and moisture in the dough, the baker cannot weigh the wet mass of dough with accuracy to insure a loaf of bread of a given weight; and no two pieces of dough are exactly alike owing to the errors arising in handling it, evaporation of moisture, and gas" (T 21).

"Other factors entering into the evaporation from a loaf of bread are the size and shape of the loaf, the duration of the baking, and the temperature of the oven. The strong or the better grades of flour used in making the best bread hold a greater proportion of water than the lower grades. Wheat flour is in a class by itself and so bread is unique. It comprises 50% of the family dietary.

"It thus necessarily follows and is a fact that the best bread, that is, bread made from the best flour, contains more moisture when it is baked than does bread baked from a poor quality of flour, and hence the best quality of bread will have more moisture evaporated from it than will the poorer quality of bread as the latter has less moisture to start with. The best bread will dry out more and faster than the poorer quality of bread. After a loaf of bread is baked it is only the water which is evaporated which thus makes a change in the weight of the loaf, but there is no difference in the food value of the loaf. It is the same food value after evaporation as it was before the evaporation. The only difference in weight is the moisture content of the loaf, and a loaf of bread weighing only 15½ ounces is of the same nutritive value as when it weighed 19 ounces.

"Bread made from a poor or starchy flour has less protein in it than is contained in good bread made from good flour, and thus in the consumption of the poorer quality of bread, some other food, such as eggs or meat having high protein content must be used to obtain a sufficient amount of protein. In

fact a loaf of bread of low protein content would require an egg or an egg and a half to raise it to the level of protein content in the loaf made from good flour or flour of high glutin content, and which has the greater quantity of moisture in it. In other words, the poor quality of bread will not furnish the requisite amount of nutritive material and so must be supplemented with more expensive food, and besides the poorer quality of bread is less appetizing, and the family using the poorer quality of bread thus eats less bread than would otherwise be consumed, and in turn eats more of other and more expensive food materials, and thus the cost of living is increased because of the low consumption of a poor quality of bread. The other and more expensive foods are necessary to obtain the necessary quantity of protein in order to have a well balanced ration. The consumer must get the necessary quantity of protein, and if he does not get it from bread, he must get it from other and more expensive foods. A good quality of bread supplies more than any other food, the best quality nutrients and at less expense" (T. 21-22).

"The demand today is for the best quality of bread, that is, bread made from high glutin flour, and the public is right, because such bread is more digestible than the poorer quality. Poor bread does not arouse the digestive organs and so is not digested without additional expenditure of energy in the body, and so poor breads are not digested with the full degree of ease, comfort and satisfaction as are breads made from the best flour. In other words, poor bread is a greater tax on the human system in its consumption than is good bread" (T. 22).

"From the experiments made and the results obtained it is not possible for a baker to make bread at all times and under all climatic conditions and have a loaf of bread which will weigh just out of the oven not to exceed 18 ounces and which in the 24

hour period following will not lose more than two ounces. That might be done on certain days, but there are days when it is absolutely impossible to make bread to conform to both the maximum and the minimum weight during the 24 hour period after baking. The two controlling factors are temperature and humidity and these vary from day to day in different parts of the country. On some days the humidity approaches saturation, which means 80% or 90%, and then on hot, dry days, the nature of bread is such that it will dry out more than two ounces to the pound within 24 hours after baking. The conditions of humidity and temperature change during the day so that the baker starting to make bread and not knowing definitely his oven conditions, who puts in enough dough to have a legal loaf at the end of the 24 hour period may have a loaf coming out of the oven in excess of the maximum weight, because the loaf in baking has not lost as much moisture as was anticipated. There is no nutritive value in what is lost, namely: the moisture.

"In the course of a few hours the loaf might soon become a legal loaf not exceeding 18 ounces in weight, but before the close of the 24 hour period, on account of the evaporation of the moisture, the loaf might then become illegal by being under weight, that is, the pound loaf may weigh less than 16 ounces, although the baker used every effort to make the loaf legal. The law under consideration makes a criminal of a baker for deviations in weight which are absolutely beyond the baker's control.

"What I have said applies to 25 loaves as well as to one loaf, and the average of the 25 would be just about the same as the weight of the one loaf and that might be true of any number of loaves passing through the same conditions of temperature and humidity. The tendency of the loaves is to become equalized as they give off the moisture, and the

surrounding atmosphere takes it up after the loaves leave the oven" T. 22-23).

"The present tendency is to improve the quality of farm products, and if a law is such as to discourage the use of the best article such as wheat, then that article has a more limited market. So a law that would discriminate against the production and use of the best flour would discourage the production of the best wheat, and the farmer would have more encouragement to raise a poorer quality of grain. The baker would come nearer to complying with the law by making bread from poor flour of low absorption, but even with such flour there would come days and times when even bread made from such would not comply with the law. I can see no way by which the baker can comply with the law having both a minimum and a maximum weight by the use of either poor flour or the best flour, though everything will be done on his part naturally to lessen variation in weight in the 24 hour period after baking. But I know of no way that would be successful in making a loaf of bread that would at all times and under all conditions comply with the maximum and minimum weight law" (T. 23).

"The public demand is for the best bread because it is moist and is more satisfying than the poorer bread. As said by Dr. Taylor, chief advisor to Mr. Hoover during the war:

"'If a bread does not look like good bread, keep like good bread, or taste like good bread, and in addition does not agree (with the consumer) as does good bread, the sentiment of the people turns against it.'

"Dr. Taylor is a recognized authority on bread and was a government expert during the war" (T. 24).

"I have never tried to make a bread which would come within the minimum of 16 ounces to the pound

and not exceed a maximum of 18 ounces to the pound, but I do not think it would be good bread. I do not say it is impossible, but I think you would not get a product that you would really call bread. If you should get the absorption in the flour and the dough, you would have a very dry and an inferior loaf. Water is necessary in bread-making and at least 55 per cent of water must be used even with the poorest dough, so that under certain climatic conditions breads made from pure flours will not pass the maximum and minimum test. The humidity and the temperature vary much, and affect the dough mixture before it goes into the oven. They are uncontrollable conditions. The mechanical losses in the handling of the dough are quite appreciable. Dough scaled at 20 ounces for each loaf might produce loaves varying in weight quite appreciably" (T. 25, 26).

"A baker, under the Smith Bread Law, might go along for twenty or twenty-five days and be all right, then there would be five or ten days when the bread would not comply with the law. The two ounce to the pound tolerance is not a sufficient variation to cover what we know will take place under extreme conditions. A loaf of bread weighing 18 ounces out of the oven depends for its evaporation upon the humidity and temperature in the room where it is kept for the 24 hours thereafter, and if the humidity and temperature could be controlled, that would tend to lessen the loss of moisture in the bread. In the maximum and minimum weight loaf law, if the baker attempts to avoid one end he is caught on the other end, and while he might be all right on one 25 loaf batch, he might be caught on the next batch. The law of averages will show that the second batch might not have the same combination and that would throw it out: Loaves cannot be obtained of the same weight. The dough itself as it goes into the oven, varies in weight even with the greatest care the

baker can bestow. There are conditions where bread will shrink the most in the first twelve hours and then there are other conditions where the shrinkage would be greatest in the last twelve hours, because of the constant change in temperature. If the temperature could be maintained at the same degree for the 24 hours, then the shrinkage would just be the normal drying for that temperature and that humidity. A baker can control the humidity and the temperature of his dough room and of his baking room, that is, in the big plants, but when the bread leaves the oven it is no longer under control. The inequality of the law arises in the fact that there is not enough leeway between the weight when baked and the weight 24 hours thereafter, because of the uncontrollable factors in the drying process" (T. 27).

Along the same line and to much the same effect is the testimony of

Jay Burns (T. 28-36).

Dr. Harry E. Barnard (T. 36-40).

Louis W. Hass (T. 40-44).

Peter G. Perrie (T. 44-46).

Charles W. Ortman (T. 46-47).

Milton Peterson (T. 48-52).

C. J. Helfrich (T. 52).

C. S. Jarnagin (T. 52-54).

P. O. L. Peterson (T. 54-55).

So when the legislature fixed a maximum weight loaf of bread, it went beyond its police power, because such maximum limitation has no relation whatever either to

the public health or welfare or to the protection of the public against fraud or deceit. Exact fixation of weight or quantity can in general be justified if at all upon two grounds only,—one that the commodity is so inherently dangerous that a limitation upon the quantity permitted to be sold is a matter of public safety; and two, that the fixing of a maximum weight will protect the public against fraud or deceit.

The first class is illustrated by the Kansas law forbidding sale of powder in any manner except in original packages containing twelve and one-half pounds of powder, upheld in *Williams* v. *Walsh*, 79 Kan. 212, 98 Pac. 777, affirmed in 222 U. S. 415. The United States Supreme Court in its opinion expressly states: "It (powder) is subject * * * to a measure of regulation from which harmless articles of commerce may be exempt."

And if the purpose of the Smith Bread Law be to prevent fraud and imposition, the attempt to prescribe a maximum limit of weight in a loaf of bread can have no relation to that purpose and is therefore invalid, because neither fraud nor deceit can be practiced under a minimum weight law such as is now in force in regard to practically all foodstuffs, not only in Nebraska, but in all the other states. The purchaser gets at least what he asks for, and in many instances gets more in weight if not in actual substance.

As stated in *City of Chicago* v. *C. & N. W. Ry. Co.*, 275 Ill. 30, 113, N. E. 849, page 851:

> "There must be some logical connection between the object sought to be accomplished * * * and the means prescribed to accomplish the end."

Moreover the Smith Bread Law abridges the right of bakers to make and to contract for bread which may be more in weight than the maximum provided in the law, even though customers demand such other weights and no one would be harmed or affected by the manufacture and sale thereof.

> "Railroad companies and restaurants require special sizes of loaves and specially shaped loaves which we could not make under the Smith Bread Law, and and as the restaurants and railroads will not take other shapes and sizes, Nebraska bakers will lose all of such railroad and restaurant trade because the railroads and restaurants will buy from bakers in the surrounding states. That trade is quite extensive and is valuable" (T. 33).

The *maximum* feature is an arbitrary and unreason- interference with the right of bakers to make sizes called for by special trades, or organizations, or industries.

Freedom of contract is property.

> Taylor on Due Process of Law, Sec. 265, p. 490.
> *State* v. *Goodwill*, 33 W. Va. 179.

> "As an incident to the right to acquire property, the liberty to enter into contracts * * * is necessarily included in the constitutional guaranty."
> *Braceville* v. *People*, 147 Ill. 66.
> Taylor on Due Process of Law, p. 491.

If bread were a dangerous article, or if its manufacture or sale should be kept within certain bounds to protect the safety or health of the public, then, of course, fixing a maximum weight limit might be within the police power of the state, but no such claim can be made concerning

the greatest of all foodstuffs, and therefore fixing a maximum limit for the loaf of bread is wholly an arbitrary act of the legislature, and without any legal reason to sustain it; and under such law the Nebraska bakers are prohibited from making and selling other sizes and weights, although their customers, such as railroads, hotels and restaurants, as is shown in the evidence, require and demand, because of the exigencies of their business, other and different sizes and weights; and although in the manufacture and sale of such other and different sizes and weights of bread, and in the consumption of such bread, no one could or would be possibly misled or injured in any way, shape or manner. The right of private contract cannot be controlled, nor abrogated by the legislature, unless such control or abrogation is demanded and made necessary by the public safety, health or welfare; and no such claim has either been alleged by the defendants or attempted to be proven by them, as a reason why the Smith Bread Law in its maximum feature should be upheld by the court.

And it may not be amiss to call attention just here to the evidence of the bakers themselves that there has not been any outcry or demand, or even suggestion from the bread consumers in the state for a standard weight loaf law. But, of course, the court will say that as to whether or not there is any necessity for such a law is a question for the legislature to determine and is not a judicial question.

Scope of Police Power of the State.

The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights and private

property. It must appear when such regulations are called in question, *that they have in fact some relation to the public health or public welfare,* and that such is the end sought to be attained thereby.

Smiley v. *McDonald*, 42 Neb. 5, 13, 60 N. W. 355.

The power is inherent in the law, but that power must be reasonably used and only resorted to for the purpose of preserving the public health, the public safety, or the public morals.

Wenham v. *State*, 65 Neb. 394, 402, 91 N. W. 421 (80 hours of female labor could be regulated).

But "on the question of the right to contract, we may well declare a law unconstitutional which interferes with or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life." *(Wenham* v. *State, supra).* And the court held in such case that the law did not *destroy* the right of contract but only *regulated* such right. The test as to whether any given law or regulation is within the police power of the state is whether "the regulation is an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation."

In re Anderson, 69 Neb. 686, 689, 96 N. W. 149.

The foregoing decisions are affirmed and approved in

Union Pacific Ry. Co. v. *State*, 88 Neb. 247, 251, 129 N. W. 290.

State v. *Withnell*, 91 Neb. 101, 104, 135 N. W. 376.

Urbach v. *City of Omaha*, 101 Neb. 314, 316, 163 N. W. 307.

Police power has been defined to be "that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

In re License Cases, 5 Howard (U. S.) 504, 583, per Taney, C. J.

In *Lawton* v. *Steel*, 152 U. S. 133, 137, the conditions justifying an exercise of police power and the right of the court to inquire into the necessity for the law are set forth as follows:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not duly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

In *Connecticut Co.* v. *Town of Stamford*, 110 Atl. 554, the rule is stated:

> "Laws presumptively for the public welfare, but in fact not, cannot be sustained as authorized exercise of the public power, and an act regulatory of this power which is oppressive or unreasonable and casts burdens unreasonably, cannot be sustained."

So also in *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870:

> "Legislation of this character which imposes an onerous burden of expense upon a lawful and highly

meritorious business cannot be justified *by the mere possibility of the danger which it ostensibly seeks to avert.*"

And in Freund Police Power, Section 494, it is said:

"To prevent an abuse of the police power for the alleged protection of health or safety, or alleged prevention of fraud, the courts must be allowed to judge whether restrictive measures have really these ends in view. A remote and slight danger should not be recognized as a sufficient ground of restriction, and the provisions of the law should be scrutinized in order to see whether they in reality tend to effectuate their object."

Upon the evidence and in the nature of things the *maximum* feature of the Bread Law does not have any reasonable relation to preserving the health of the people and is palpably unreasonable and arbitrary, and exceeds all bounds of reasonable classification; therefore, such law is not within the police power of the state and violates the provisions of the United States Constitution.

Price v. *People*, 238 U. S. 446.

This court said in the opinion in the Foreign Language Law case:

"The liberty protected by the Fourteenth Amendment to the Federal Constitution may not be interfered with under the guise of protecting the public interests by legislative action which is arbitrary, or without reasonable relation to some purpose within the competency of the State to effect,"

and

"Determination by the Legislature of what constitutes proper exercise of police power is not final

or conclusive, but is subject to supervision by the courts."

Meyer v. *State of Nebraska*, 67 L. Ed. U. S. 698.

The business of baking bread for the public consumption or of selling it to the public, does not clothe such business with a public interest so as to subject the business to public regulation.

Wolff Packing Co. v. *Court of Industrial Relations*, 67 L. Ed. U. S. 756.

And again in the Minimum Wage case you said that

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule, and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances" (p. 443).

And you also said that

"The right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this court, and is no longer open to question" (Citing numerous authorities, p. 442).

Adkins v. *Children's Hospital*, 67 L. Ed. U. S. 440.

In the opinion written by this court concerning the validity of the Kansas liquor law it is said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While

every possible presumption is to be indulged in favor of the validity of a statute *(Sinking Fund Cases*, 99 U. S. 700, 700, 718,) the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Mugler v. *Kansas*, 123 U. S. 623, 661.

The Supreme Court of Nebraska has said:

"Police power is that undefined branch of government which bears the same relation to the municipality that the principle of self-defense bears to the individual. *Barrett* v. *Rickard*, 85 Neb. 769. 'Police power is founded upon public necessity and only public necessity can justify its exercise.' *Spann* v. *City of Dallas*, 235 S. W. (Tex.) 513, citing

Cooley, Constitutional Limitations (5th ed.) p. 248. The text reads: 'And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages.'"

State v. *Edgecomb*, 108 Neb. 859, 864, 189 N. W. 617.

And that court in the same case approved the language of Mr. Justice Harlan in *C., B. & Q. R. Co.* v. *Drainage Commission*, 200 U. S. 561, as follows:

> "And the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation; whether arbitrary or reasonable, and *whether really designed to accomplish a legitimate public purpose.*"

All police power enactments must really tend to accomplish beneficial public purposes where they interfere with individual rights and the enactments must not be arbitrary or unreasonable.

12 Corpus Juris, 909.

People v. *Klinck*, 214 N. Y. 121, 101 N. E. 278.

And the Supreme Court of Nebraska has also said that the constitutionality of an act may depend upon the result of its practical operation.

Erickson v. *Nine Mile*, 109 Neb. —, 192 N. W. 694.

Such being the law the evidence is overwhelming in this action that it is utterly impossible to scale dough so

that twenty-five or more loaves of bread of one unit baked therefrom, will, under the numerous uncontrollable and varying conditions, comply with both the maximum and the minimum weights provided in the Smith Bread Law.

> "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the *safety* and *welfare* of the public at large. * * * The legislature *cannot*, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose."
>
> *C. B. & Q. R. Co.* v. *State*, 47 Neb. 549, 66 N. W. 624.

And this is our contention herein, that there is no obvious and real connection between the maximum feature of the Smith Bread Law, and the assumed purpose of the law, which purpose is to prevent short weight bread.

The principle involved in the "Trading Stamp" cases is the same as the principle involved here, and therefore the decisions in those cases are helpful to a decision here.

In the case of *State* v. *Sperry*, 94 Neb. 785, 114 N. W. 795, in which the court upheld the Trading Stamp system used by merchants it is said:

> "A reading of them (the various trading stamp laws) will show that, while their real purpose is attempted to be concealed in the language used, it is apparent that such real purpose is to abolish the trading stamp system as a method of advertising by

> retail merchants. The question is: Is it within the power of the legislature to do so? The police power of the state has in recent years, at the demand of a persistent and in many cases an aggrieved public, been greatly extended by judicial construction; but the courts have not yet, except in very few instances, gone so far as to hold that under this power a legislature may forbid contracts which have always been held to be within the constitutional right of persons in every state, to possess and acquire property, to transact legitimate business, and to fully enjoy freedom of contract in relation thereto."

And the opinion quotes approvingly from the case of *Young* v. *Commonwealth*, 101 Va. 853, 867, as follows:

> "We think it is clear that such a prohibition (against selling a given article and giving to the purchaser something in addition) is an unwarranted interference with the individual liberty which is guaranteed to every citizen both by our state constitution and also to the 14th Amendment to the Constitution of the United States. * * * This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always of course, that the business and the mode of carrying it on are not injurious to the public, and provided also that it is not a business which is affected with the public use or interest."

And this court in its opinion cites other authorities to the effect that "Gift Enterprises" are not illegal because they purport to give the purchaser *more* than he is buying or paying for.

The language of the court in *State* v. *Ramseyer*, 73 N. H. 31, 58 Atl. 958, a trading stamp case, is very applicable. The court says:

"The statute in question is prohibitive. It makes it a crime for one to carry on a legitimate business in a manner not before supposed to be illegal or improper. It deprives the citizen of a means of acquiring and possessing property which previously he had possessed as of right; and such invasion and deprivation of private right can only be justified, if at all, by proper legislative action in the exercise of the police power. * * * Considering the apparent object of the statute, ascertained by construing its language in the light of all competent evidence, the court is unable to discover how it promotes the public welfare as a police regulation. * * * In the absence of sufficient evidence that it is a police regulation, it cannot be judicially declared to possess that character; and if it is not, under the constitution, an exercise of the police power, it finds no justification in that instrument."

The court in the last decision mentioned quotes at length from other decisions to the effect that unless the state shows that a law enacted as being within the police power is for the protection of the public health, the public morals, or the public safety, such law will be held to be inimical to the Constitution and thus void. And the language of this court in *Mugler* v. *Kansas*, 123 U. S. 623, is also applicable to the instant case where it is said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substances of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured

by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

And if such be the law as to "Trading Stamps" and "Gift Enterprises" where some other "article" is given to the purchaser in addition to what he buys, how much more should the Smith Bread Law be held void when it prohibits the purchaser from being given more of the very article he is getting and for which he pays?

The Smith Bread Law is not within the police power of the State, and is an arbitrary, unreasonable, unwarrantable and oppressive exercise of the legislative function; and the law is unworkable and impossible of compliance by the bread bakers and dealers of the state.

Bread is not only the "Staff of Life," but it is in a class by itself and has no competitor. There is no article of food so universally consumed as bread, nor is there any other article of food consumed by mankind to such extent and in such quantities as bread. Moreover there is no food stuff which is subject to such uncertainties in its making as is bread, for the baker is confronted from the time of the performance of the initial act until the finished loaf is taken out of the oven and thereafter, with uncertain elements over which he has not full control, and therefore a loaf of bread is properly represented by the symbol X because it is an unknown quantity both as to size and weight, and to a greater or lesser degree as to quality.

> "Bread is in a class by itself as food. There is no food subject to so many external influences which may change its character and influence its weight

as bread, and that is the difficulty that the members of the government committee have had in trying to standardize bread.

"Bread might be made which would fall within the limits of the Smith Bread Law, but it would not be what we call commercial bread. I do not believe people would eat it. It would not be such a bread product as the people demand today." (T. 38, 39, Dr. Harry E. Barnard).

The evidence discloses that the uncertain elements commence with the wheat grown in the fields and which is the basis of bread, because the wheat quality is affected by the character of the soil and the climatic conditions where grown. (Dr. Harry Snyder, T. 22).

One of the most important ingredients in making bread is the quantity of water held in the dough, as water is essential together with heat, for the purpose of rupturing the starch cells in the flour, and to the extent that such cells are ruptured, the resulting bread is of good food value; and contrariwise, to the extent that the cells are unruptured, the resulting bread is of poor food value. (J. Burns, T. 28).

Thus it becomes of paramount importance to have as much water as is possible in the dough from which bread is baked, and also in the bread itself, that assurance may be had of enough moisture to rupture all the cells, or most of them at any rate, in the baking process; for if in such process all the moisture be consumed and evaporated before the cells are broken, then the resulting bread is proportionately indigestible and lacking in food value; whereas if there be an excess of moisture in the loaf when baked, then it is probable that all the cells

have been broken and disintegrated and the resulting bread is of the best quality in accordance with the flour used, and has the greatest food value. And it is also perfectly clear from the evidence in this action that the best quality of flour contains the greatest percent of moisture, and consequently produces the finest quality of bread; and it is equally clear from the evidence that the buying public insist upon having for consumption the best quality of bread when it is obtainable.

> "Under the Smith Bread Law, a greater quantity of dough with high moisture content must be put in the oven to get a given weight loaf than is required of dough with low moisture content, because the better loaf will contain more moisture and will evaporate more and faster than will the poorer quality loaf made from dough with a low moisture content, and there will be much greater chance for an illegal loaf of good bread than there will be for an illegal loaf of poor quality bread, as the latter will not evaporate as much moisture in a 24-hour period after baking as will the former. The better the quality of the bread, the greater is the shrinkage, or the evaporation of moisture during 24 hours after baking. So that the Smith Bread Law will, of necessity, force the bakers to use a poorer grade of flour having less moisture content and poorer quality gluten, in order to produce a loaf of bread having a minimum evaporation of moisture after baking and for 24 hours; and the quality of the bread will thus deteriorate, as many starch cells will be unruptured and these are detrimental to the stomach." (T. 29—Jay Burns).

It is also shown in the evidence beyond dispute that because of the greater quantity of water in the best flours, the bread baked therefrom contains when it comes

out of the oven, the greatest quantity of moisture and is subjected to the greatest shrinkage in weight thereafter by evaporation of the moisture during the 24 hour period, although such shrinkage has not in the slightest degree lessened the actual food value of the loaf as such value is contained in the dry matter or solids which are not affected in any way by evaporation of moisture from the loaf after it is baked. (Dr. Harry Snyder, T. 20-24; Dr. Harry E. Barnard, T. 36-37).

It is also undisputed in the evidence that the quantity of moisture in the flour and in the other ingredients which are mixed to form a dough, is unknown; and it is also a fact that the evaporation of moisture during the processes of mixing the ingredients and fermenting, scaling and proofing the dough, is uncertain and uncontrollable; so that when a given quantity of dough is placed in the oven, it is not known to the baker just what proportion is dry or solids, and what proportion is water; and neither can the evaporation of moisture in the oven during the baking process be controlled, *so that it is absolutely impossible to know beforehand the weight of a loaf of bread baked from a given weight or quantity of dough.* (Snyder, T. 21; Burns, 32-33; Barnard, 36; Haas, 41, Pirrie, 44; Ortman, 46; M. Petersen, 49; Helfrich, 52; Jarnagin, 53).

And this is so because the evaporation of moisture after scaling and during the mechanical handling and dividing, and also during the proofiing and baking, is not subject to the control of the baker; as he cannot completely control either time of handling and baking, nor the temperature and humidity, which obviously greatly

affect the evaporative process both before and during the baking.

So the evidence is conclusive to the point that the finished loaf of bread when it comes out of the oven is uncertain as to the quantity of water it contains; and it is equally conclusive that the *best bread* has for twenty-four hours after baking, under ordinary conditions, the greatest evaporation of moisture, depending upon physical conditions.

It is also shown that the best quality of bread, that is, bread made from the best flours, and the quality of bread generally sold, will, under some ordinary conditions, evaporate more than two ounces of moisture to the pound loaf within twenty-four hours after baking.

It is true that defendants produced as witnesses some small bakers to prove that *on a given day* they weighed some loaves when baked and also twenty-four hours afterwards, and the average loss was less than two ounces to the loaf; but in all the experiments save one, the loaves were wrapped in waxed paper which the evidence shows and which is self evident, holds the moisture and prevents evaporation. But the great bulk of bread is sold unwrapped, and there is no law in Nebraska requiring bread to be wrapped. Moreover the wrapper is detrimental to the bread, as the latter becomes soggy because of the retention of moisture. Again, defendants' experiments or tests were made without regard to either temperature or humidity, and, therefore, are worthless as a guide to results which might be obtained during the varying conditions prevalent during the whole year or a whole season.

Plaintiffs' experiments, on the contrary, were made on different days and at different hours of the day, so as to reflect as near as possible the varying temperatures and humidity during the year; and while those experiments showed, as did the experiments of defendants, that on certain days in the year, perhaps the majority, good bread could be made to conform to the Smith Bread Law, yet on very many days at different periods, owing to constantly varying conditions of atmosphere and humidity, the loaves of bread would be illegal at some time in the twenty-four hour period after baking; and the experts agree that such results would be had even with the poorer qualities of flour which contain the minimum of moisture.

The experts also agree that while a substance might be baked which would be so dry when made that it would not evaporate more than two ounces to the pound loaf during the twenty-four hour period and thus the loaf would be a legal loaf during all of that time, yet that such substance would not be bread in the sense in which that word is used today, and would not be such bread as is now being made and consumed throughout the length and breadth of the land. Such substance would not be saleable to the public as bread and would not be purchased by it as bread.

> "I could produce a product which would comply with the Smith Bread Law and my competitors could do likewise, but the product would not be salable. It would not be wholesome bread and it would not serve the purpose of bread." (Testimony of Peter G. Perrie, T. 46).

> "I know of no method whereby bakers can produce the bread which is made for the market today, and know beforehand that 25 loaves of any one

size would always, within a 24 hour period, average not less than 16 ounces, nor more than 18 ounces to the pound. I would say from my experience that it is an utter impossibility, and if it were possible to change the character of the bread and comply with the law, then there would be an unmarketable product." (Testimony of Jay Burns, T. 35).

But the legislature in enacting the Smith Bread Law obviously had in mind such bread as is made and consumed today—not some unknown and untried product, such as seems to have been in the mind of counsel for defendants when he asked plaintiffs' experts, who made the tests and experiments, whether or not they had tried to produce an article which would not evaporate under all sorts of heat and humidity more than two ounces to the pound in the twenty-four hours after baking. Of course such experts and bakers answered no, for their tests and experiments were made with bread of similar quality to that now made by the bakers and sold to and demanded by the consuming public; and the results obtained were ample to demonstrate that good bread could not be made during the period of a year or even a large part of it, to comply with the Smith Bread Law in both its maximum and minimum features, for the reasons stated.

So that perforce the bakers will be branded as criminals in spite of themselves, and no matter how law abiding they may be in all other respects.

While there are many and very weighty reasons against a standard weight loaf of bread because of the "uncontrollable" factors entering into its manufacture, yet the Smith Bread Law would not have been attacked had it not fixed a maximum as well as a minimum limit of

weight for the twenty-four hour period after baking. In other words, if the law had been aimed only at short weight bread, such as are all other laws involved in the reported decisions, the bakers could comply with it without running any chance of becoming criminals, because they could scale their dough at such a weight as to be reasonably certain to make the minimum weight of loaf under all the varying and uncertain conditions shown by the evidence to prevail in the baking of bread. Such a course on the part of the bakers might and would involve a very considerable extra expense, but the purchaser would at all times be getting the benefit thereof insofar as weight is concerned, because he would oftentimes get more weight than the minimum provided in the law, although such extra weight would only be water.

The uncertain and uncontrollable elements in the manufacture of bread may with profit be enumerated as follows:

1. The quality and condition of the ingredients when bought, especially with reference to the amount of moisture contained therein.

2. Conditions of storage after being bought and before being used in the manufacture of bread.

3. Mistakes made in weighing or measuring the ingredients used in the manufacture of bread.

4. Loss sustained during the mixing process of the ingredients.

5. Loss sustained in the fermentation period of the dough.

6. Chemical losses and changes in the fermentation period.

7. In scaling, either mechanically or by hand, small particles of dough become detached from one loaf and attached to another loaf and, therefore, the weights of the loaves vary.

8. In handling weighed balls of dough before inserting same in the oven, a certain amount in weight is lost in the process and in chemical changes constantly taking place.

9. Losses beyond the control of the baker in the dough while in pans and undergoing the proofing process.

10. The first dough inserted in the oven comes out last owing to the construction of the oven, and so more moisture is evaporated in the oven from those first in than from the others.

11. The temperature in the ovens varies in the different parts thereof and consequently there is different evaporation in the loaves.

12. The humidity in the ovens varies in different parts thereof and cannot be controlled, and thus different results are obtained in the different loaves which are at one time in the oven.

13. There is a difference in the heat in different parts of an oven, and also in the intensity of the heat, and, therefore, the different loaves vary in the amount of moisture evaporated, though baked in the one oven at the same time.

14. The mechanical devices used in the modern bakeries for immediately transporting baked loaves from the

oven to other parts of the plant occasion more or less loss of weight.

15. After loaves of bread leave the oven and while being cooled, and before they reach the consumer, the conditions of the air as to moisture and humidity are absolutely beyond the control of the baker.

16. In the handling of bread on shelves, racks, cases, etc., in the manner in which bread is now distributed from the modern bakery, there is an uncontrollable element of loss in the weights of the loaves. (Pirrie, T. 45).

The evidence shows a *minimum* uncontrollable loss (and it may be much more) in the dough and in the baking process in the oven of six per cent, which loss must be provided for before cognizance is taken of the evaporation in the baked loaf after it leaves the oven. This means that on an eighteen ounce loaf of bread, which is the maximum under the Smith Bread Law for a pound loaf, 1.08 ounces are lost in this uncontrollable element before the baked loaf leaves the oven, which thus leaves only .92 ounces, or less than one ounce of margin for evaporation of moisture from the loaf after baking. But the evidence also shows that under very dry atmospheric conditions, four ounces or more of moisture may evaporate from the one pound loaf of bread after the dough is scaled. Such fact of four ounces evaporation was mentioned by this court in the Schmidinger case thus:

> "It appears that in order to insure bread of the standard weight of 16 ounces (for the pound) it is necessary to scale the dough before baking at about 20 ounces"

Defendants saw fit to confine their experiments to a few small bakeries in Lincoln, each experiment being made only on one given day and only at one period in that day, and without regard to temperature or humidity prevailing in the place where the bread was kept for the period after baking. Plaintiffs do not claim that there will not be days, nor even many days, when a two ounce tolerance may be sufficient for the pound loaf; but they do claim, and the evidence clearly shows the claim to be well founded, that such tolerance cannot be met on very many days of the year or even at all times in many single days, because of the great and quick changes in heat and humidity such as experienced frequently in the state of Nebraska. It is the exception that proves the rule.

Moreover the experiments made for defendants were almost entirely with *wrapped* bread, and the evidence is clear that wrapping prevents the evaporation of moisture and makes the bread as a result of the wrapping, wet and soggy and unpalatable, if the wrapping be done immediately after the loaf leaves the oven, as was done in the experiments, so that there was no chance for evaporation which is greatest ordinarily in the first few hours after the loaf leaves the oven (Long, T. 60; Dunn, T. 60; Weiler, T. 61; Smith, T. 62; Zeimer, T. 62; Maretz, T. 63).

But as the law does not require that bread shall be wrapped, therefore, the experiments submitted by the defendants, even though those experiments had covered all varying conditions of temperature and humidity as shown by the government charts in evidence, are rendered valueless, because not made with such bread as is contemplated by the Smith Bread Law, viz: unwrapped bread.

All the experiments made by or for the plaintiffs produced bread such as is in general use today throughout the state and unwrapped; and the results whether in the bakery under the conditions prevailing, or in the laboratory under absolutely controlled conditions, show that in Nebraska it is at many periods of time utterly impossible to scale the dough and produce loaves of bread that for twenty-four hours after baking, will not exceed 18 ounces in weight, nor be less than 16 ounces in weight to the pound. The baking experiments shown in evidence by plaintiffs were made under different conditions and such as will ordinarily exist at different times in a bakery, and demonstrate indubitably the unreasonableness and the unworkability of the Smith Bread Law if it shall be upheld and enforced; and of course all statutes should be enforced if respect for the law is to be engendered, as it is a well-known fact that non-enforcement of any law creates contempt for all law, and makes for poor citizenship and a chaotic and dangerous condition in the commonwealth and in the nation.

The Smith Bread Law has nothing to recommend it and it is wholly reprehensible from every standpoint. The court will bear in mind that the shrinkage in the weight of the loaf after baking and for twenty-four hours, be it much or little, does not in the slightest degree lessen the food value of the loaf, as the loss by evaporation only consists of water (Dr. Barnard, T. 37).

As stated by the witnesses, the inevitable result of the enforcement of the law will be to drive the bakers into using the lowest grade of flours which contain the lowest moisture content, and thus reduce to a minimum the

danger of making an illegal loaf; but with the consequent result of an inferior loaf, having less food value, and being of positive detriment to the extent that the starch cells are not ruptured and thus leading to indigestion or worse, because the cells ferment in the intestinal canal and trouble at once begins. But such procedure on the part of the bakers will be all to no purpose, because the evidence is clear that even with the poorest flours it will be impossible at times for the bakers to manufacture loaves of bread which will be legal when baked and also during the whole twenty-four hour period thereafter (Snyder, T. 21; Burns, T. 29; Barnard, T. 37; Haas, T. 43; Pirrie, T. 44-45; M. Petersen, T. 51; Jarnagin, T. 53).

It is impossible to contrast the character of the witnesses for plaintiffs with that of the witnesses for the defendants without exposing in a very marked degree the weakness of the defense in the evidence they offered.

Character of Plaintiff's Witnesses.

Dr. Harry Snyder is a graduate of Cornell University. Spent thirty consecutive years as a food chemist specializing in wheat flour and bread; eighteen years of such time in charge of the Food Experimental Station of the University of Minnesota; is author of several text books on the nutritional value of cereals, and for many years has collaborated with the Department of Agriculture at Washington, and is an accepted authority on the subject of foodstuffs.

Peter G. Pirrie is a graduate of Armour Technical Institute; has been for ten years a specialist in the chemistry of flour and bread; is now director of the School of

Baking in the William Dunwoody Industrial Institute at Minneapolis, and has a practical knowledge of present day bakeries.

Dr. H. E. Barnard is a graduate of New Hampshire College; was for fifteen years Deputy Food Commissioner of the State of Indiana; for the past three years has been Director of the American Institute of Baking; and is now on the United States Government Commission to investigate the subject of bread, and provide, if possible, for a practical method of standardizing the weight and quality of bread.

Louis W. Haas is a graduate of the University of Heidelberg; is a master baker by trade; has for many years specialized in the chemistry and fermentation of dough; is now Chief of the Laboratory and Technical Service Department of W. E. Long Co., Chicago, engaged in the endeavor to create better conditions in bakeries and make better bread.

Charles S. Jarnagin has continuously engaged for thirty years in the manufacture of bread; was for ten years Baking Expert for the Washburn-Crosby Co., Minneapolis, and Fleishman Yeast Co.; and for two years was baking expert for the United States Government in the Panama Canal Zone.

Jay Burns is the President of Jay Burns Baking Co., Omaha, engaged in the manufacture of bread. Has for ten years made a special and exhaustive study of bread, its nature and manufacture; is on the Executive Committee of the National Bakers' Association engaged in

the constant effort to improve conditions in bakeries and the quality of bread.

Charles W. Ortman is a retail baker in Omaha; is a practical baker of thirty-five years standing; bakes from 200 to 500 loaves per day, which bread is sold over the counter to customers.

August Louie has been a baker for over fifty years, and is general manager, Skinner Baking Co., Council Bluffs, Iowa.

Milton Petersen is general office and sales manager for Petersen & Pegau Baking Co., Omaha, and helped make the tests and experiments.

C. J. Helfrich has been a baker at Hebron, Nebraska, for about fifteen years, and bakes about 400 pounds of bread daily.

P. O. L. Petersen is superintendent of the Petersen & Pegau Baking Co., Omaha, and has been a baker for about thirty-four years.

Walter J. Paulisson is manager for the Butternut Co., of Lincoln, with daily output of about 8,000 loaves.

The testimony of some of these men with nation-wide reputation as leaders in their respective lines, should give weight and authority to their statements which is not possessed by any of the witnesses for the defense.

Character of Defendants' Witnesses.

William Cluett is Chief Deputy Inspector of Weights and Measures for the city of Chicago; knows nothing about practical baking or ingredients in bread.

J. W. Long is Inspector of Weights and Measures in the city of Omaha; not a practical baker.

Thomas J. Dunn is assistant inspector of weights and measures in the city of Omaha.—not a baker.

George J. Weiler has been a journeyman baker for about six years and has been employed at the Lett Baking Co., Lincoln, for about a year.

Robert Cordell is a journeyman baker with Lett Baking Co., Lincoln.

Vernon G. Zeimer is state scale inspector for Nebraska,—not a baker.

Harley Mertz is a journeyman baker employed by Lett Baking Co., Lincoln.

John Whistler has been a baker for about twenty years and is with Sunlight Bakery, Lincoln.

None of defendants' witnesses qualified as an expert in the matter of conditions surrounding the baking of bread, and all of them, according to their testimony, produced bread of some sort under conditions which lacked completely any semblance of scientific control, or accuracy. None of them knew the character or quality or amount of the various ingredients used in producing the dough, and none of them could give any information relative to the temperature or humidity of the place where the bread was kept for the twenty-four hour period after it was baked; and moreover, they all, with one exception, experimented with wrapped loaves of bread.

The Smith Bread Law is not beneficial, but is detrimental to the consumer.

Now if it be assumed that the bakers of bread could comply with the Smith Bread Law, what is the benefit to the consumer? Or to put it differently, what is the detriment to such consumer?

Defendants' answer that the purchaser of a loaf of bread will always know that he is getting what he buys—that is, a half pound, or a pound, or a one and one-half pound loaf of bread, neither less nor more, allowing for the tolerance of two ounces to the pound. But what harm is there to the purchaser and consumer if he gets *more* than he demands, or than he pays for? And the only answer to this query is, that *may be, if it be too much more*, he will think he is getting a heavier loaf than it really is *because it looks heavier*. But this is instantly met with the incontrovertible fact that under a *minimum* weight law, such as is in force in many of the states, the purchaser is absolutely protected, because he gets *at least* that for which he asks and perhaps more; otherwise the baker and the dealer are subject to prosecution for violation of the law.

And the reason why the consumer will frequently get more than the requested weight of loaf is because the bakers, to be on the safe side of the question, will always scale sufficient dough to make a legal loaf of bread in weight during all possible variations in temperature and humidity for the twenty-four hour period after baking, though under humid conditions the loaf might weigh and, indeed, will weigh, very much more than the eighteen ounces for the pound, but the added weight is only

water, and the bread is of as good food quality at one time as at another, though perhaps not so palatable under one condition as under another condition. Bakers, under a minimum weight law, will always arrange to be within the law, because bakers, like other law abiding citizens, are not desirous of being classed as criminals.

The only suggestion made during the trial of this action was to the effect that where a three-quarter pound, or a twelve ounce loaf is permitted to be made, it might be found that the bakers would make a fourteen or fifteen ounce loaf and label it three-quarter pound, so that to the eye the loaf might appear to be a full pound loaf, and the customer so believing it to be a pound loaf, would be cheated to the extent that it should lack being sixteen ounces in weight. But the argument (and there is no proof of the fact) is absurd, because if the purchaser asks for a twelve ounce loaf of bread and he gets less than such weight, then the dealer is subject to prosecution under a minimum weight law; and if the purchaser gets more than the twelve ounces of bread asked for, then he is, to the extent of the excess weight, just so much better off than he expected to be in making his purchase.

If a purchaser asks for a pound load of bread and gets only a fifteen ounce loaf, then under a minimum weight law the dealer and the baker are subject to prosecution, no matter what the *appearance* of the loaf of bread may be either as to size or weight.

But on the other hand, if the purchaser only asks for a loaf of bread, then under the minimum weight law he will get whatever size the dealer sees fit to hand out, and if it be a fifteen ounce loaf of bread for which he pays

the three-quarter pound price, he is not cheated nor defrauded. Likewise, if he pays the pound price for a three-quarter pound loaf of bread he is not cheated nor defrauded, because he did not *ask* for a pound loaf, but only for a loaf; and as the law neither fixes the price of a loaf of bread nor requires the dealer to sell bread by weight, there is no possibility of fraud being perpetrated any more than there is a chance of fraud in the purchase of a hat when the purchaser does not specify its weight at one pound, though he may have in mind getting sixteen ounces of felt when he asks merely for a hat.

In other words, under a minimum standard weight loaf law it is the theory that the customer shall ask for a certain weight loaf because different weights of loaves are permitted under the law; and hence such law provides that when a certain weight law is designated, as it must be in order to be distinguished and in order that the dealer may know what is wanted, then that loaf must weigh at least the given weight asked for. It thus happens that a standard weight loaf law is what all the courts have designated as a law *against short weight* bread, and the enactment of such a law is therefore a proper exercise of the police power of the state because it is for the benefit of the people and is not detrimental in any way, shape or manner.

While it might be perfectly proper, if it were legal, to create a *maximum* and a *minimum* limit for other foodstuffs which can be controlled accurately in their manufacture, yet it is not proper to so legislate in connection with bread because of the uncontrollable elements entering into its manufacture, and the impossibility of predetermining the quantity of dough which must be scaled

to produce a loaf having a maximum and minimum weight during twenty-four hours after baking under the changeable conditions existing in Nebraska. The public is not benefited by such a law, and under it the baker and the dealer are subjected to criminal prosecution without their fault and in spite of their best efforts, and will thus be deprived of both their liberty and their property unjustly, and all under the alleged police power of the state when that power cannot be shown in any way to sustain such law.

The law as enacted, by its title is only meant to cover the quantity and not the quality of a loaf of bread. There can be no claim that the public health will be bettered by a fixed weight of loaf, so that unless it is apparent that the public welfare will be improved or that fraud will be prevented, then the law must fail as an exercise of the police power of the state.

Bread is sold at the stabilized prices of 10c for a small loaf, and 15c for a large loaf. Heretofore, on an increase in the prices of ingredients, the size of the loaf has been reduced; and on a decrease in the prices of the ingredients, the size of the loaf has been increased; so that the consumer has always had the benefit of price fluctuations of the ingredients and the quality has always been kept up to standard.

But it is apparent that under the Smith Bread Law, in case of an increase in the prices of ingredients, the baker must either reduce the quality of the loaf or must increase the price of such loaf. In the former case the public health and welfare are affected adversely as the quality of the bread is reduced.

If, however, it were feasible to change the current price of a loaf to meet fluctuations in the prices of ingredients, then the public welfare is again adversely affected, because the lowest unit of money is one cent, and so if the baker has a profit of ¼c per loaf retailing at 10c, and the quarter cent margin be wiped out by the increase in the prices of ingredients, then the loaf price must be advanced at once to 11c and the baker or the dealer or both will make a one cent profit as against the normal quarter cent profit, and the consuming public will pay such abnormal profit.

No fraud is prevented, because under existing law all wrapped loaves are required to be stamped with their weight so that the purchaser is not misled in any way, but can see that he is getting what he pays for. And even if the loaves be not stamped with their weight, it is the privilege of a buyer to have same weighed just the same as is done in the purchase of other food supplies.

So that under any view that may be taken of the effect of the Smith Bread Law, it is not in the interest of the buying public but is against such interest, and therefore, the law cannot be sustained under the police power of the state.

The Smith Bread Law denies to the citizens of Nebraska the equal protection of the law.

The evidence shows that the great bulk of bread shipped into Nebraska from surrounding states is in quantities of less than twenty-five loaves of one size, and this is so because the public demand is for fresh bread and thus bread is bought by the dealers in small

lots. Now, in the case of bread made by Nebraska bakers, the government official or inspector can get twenty-five loaves of any one size and any one dough from any source whatever, whether in one or a dozen places, and can take same to the bakery where they were baked and there weigh them as required by the law, and if they are found to be under or over weight, then both baker and dealer are subject to arrest and prosecution.

But it is different in regard to bread shipped in from the surrounding states as such bread must be weighed "where sold or exposed for sale." So if any dealer has only twenty-four loaves of imported bread of one unit of weight, no matter how much they may be short in weight, the government officer cannot get the twenty-five loaves which are necessary to weigh *on the premises*, and the dealer in imported bread will be immune from arrest and can retail his twenty-four loaves with entire impunity, because it is a foregone conclusion that such dealer will take mighty good care to purchase only twenty-four loaves of one unit; and the more especially as by so doing, he will be assured of having fresh bread on hand constantly, as deliveries of small lots are made frequently, and especially in Omaha, which is the largest city in the state and hence the largest consumer of bread.

So we will have the spectacle of one bread dealer, who believes in patronizing home industry and in building up his community, and who buys Nebraska baked bread, being subject constantly to inspection and prosecution if the bread purchased does not comply with the law; while his competitor across the street who doesn't care a farthing for protection of home industries and who buys

foreign baked bread in twenty-four loaf lots and exposes it for sale and sells it, will be entirely immune from any prosecution. Certainly such a condition of affairs, which will be brought about by the Smith Bread Law, does not afford equal protection of the law to all citizens, as the Constitution requires.

In fact the law will put a premium upon rascality, because the unpatriotic dealer will be knowingly violating the law and will escape its penalties; while the good citizen who endeavors to sell a legal loaf and to comply with the law, will be penalized to a certainty for so conducting himself.

It is quite certain that the legislators did not analyze the Smith Bread Bill fully and did not observe that it favored the outside bakers at the expense of the Nebraska bakers, or most assuredly the honorable law makers would never have enacted the measure into law. They would not knowingly pass a discriminatory act subjecting persons engaged in the same business of dealing in bread to different restrictions, or giving them different privileges under the same conditions, as does the Smith Bread Law, for such will be the natural consequence of the operation of the law.

The burden of proof is upon the defendants to show that fixing a *maximum* weight for a loaf of bread is within the police power of the state, and they have not sustained that burden. The Smith Law singles out bread, which is the only dietary article that passes through a quite lengthy and intricate process in its manufacture, and is subject in an extraordinary degree to the element of uncertainty as to its weight when it is

finished and ready for consumption; but the Smith Law ignores the *maximum* feature in the dietary articles which do not go through such intricate processes in manufacture as bread, and which are capable of division as bread is not. And in the case of milk or cream all persons are allowed to contract for whatever sizes or weights they choose.

The existing statute in Nebraska in regard to "dry commodities," specifies only a minimum weight or count as follows:

> "All dry commodities not otherwise specified in this article shall be sold only by standard weight, numerical count or linear or surface measure, except where parties shall have a written agreement specifying some other unit of measure, or in the case of fruits and vegetables in containers, other than as specified in Sec. 7586, where the container is labeled or stamped designating the minimum weight, or the minimum numerical count (C. S. 1922, Section 7585).
>
> "All sales of blackberries, blueberries, cranberries, currants, gooseberries, raspberries, cherries, strawberries, and similar berries, also onion sets in package of one peck or less, may be sold by the quart, pint or half pint, dry measure" (C. S. 1922, Sec. 7586).

Butter packages shall each contain 16 ounces avoirdupois.

> "A print or package of butter shall contain one pound avoirdupois" (C. S. 1922, Sec. 7588).

These requirements mean, under the decisions heretofore cited, that the weights and measurements are minimum, with no limitation whatever as to maximum.

And no one ever heard of a purchaser of berries registering a kick because he got more than a pint in his box and when he only asked for and only paid for a pint. People are not built that way, and the mere suspicion or conjecture or guess on the part of legislators that some one may be defrauded because of his own negligence and carelessness, is scarcely in this enlightened age, a sufficient ground for passage of the Smith Bread Law, which will cause the creation of a few more positions as inspectors, etc., for political hangers-on at the expense of the already heavily burdened tax payer. That same tax payer is making bold to say that the mania for making laws and regulations has been carried to excess, and that we would be infinitely better off if the majority of present laws were repealed, instead of having them added to in number by every succeeding legislature. And the tax payer is right.

It occurs to us that it is worth while to call attention to the fact that the United States Pure Food law, as shown in the evidence, has a provision explicitly setting forth that loss in weight of foodstuffs caused by natural conditions (heat, humidity, etc.) *shall not be held a violation of the law of fixed weights.*

> "In the United States Food Law it is provided in the regulations that discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water, shall not be considered, but are allowable tolerations and are not a violation of the law; that is to say, if a loaf of bread is a

legal loaf when it leaves the oven, it makes no difference under the federal law, how many ounces it loses in weight after that time, because climatic conditions are beyond the control of the baker. In the law, bread as such is not specified, but the law applies to all foodstuffs" (T. 23, Dr. Harry Snyder).

"And the U. S. Government has found that a standard weight loaf does not meet requirements and does not benefit the people.

"At the beginning of the war, the U. S. Government Food Administration required standard weights of bread of ¾ pound, one pound, 1½ pounds, and multiples of one pound, and all made from one grade of flour, and the formula from which bread was made was also prescribed, so that every baker in the United States was compelled to use the same kind of flour and to make bread from the same formula, and so there was present all of the elements of control necessary in the operation of a standard weight regulation. Such regulations by the U. S. Government were abrogated shortly after the armistice; and later, owing to the Government wheat guarantee to the farmers, the head of the U. S. Grain Corporation, Julius Barnes, made an investigation with reference to bread and as a result the bakers were required to reflect a fluctuation in the price of flour and ingredients by making a variation in the weight of the loaf of the bread, rather than by changing the selling price of the loaf, and that has been the practice of the bakers throughout the country up to this time, and was the practice prior thereto. This practice cannot be continued under the Smith Bread Law. At the present time any one flour mill might make 40 or 50 different grades of flour, and it is not possible to say how many grades or qualities of flour there are now made, from which bread is or may be baked" (T 31-32, Jay Burns).

Moreover, a very significant fact appears in the testimony of Dr. Barnard in his statement that the United States government is at the present moment, through competent men, studying the bread problem, and is trying to formulate a law whereby the nutrient qualities of bread may be standardized, and thus the substance of the loaf may be preserved; instead of having such laws as the Smith Bread Law, which aims only to preserve the shadow, that is, the water, which may be in bread, and which ignores the substance, which is the dry or food content in the loaf. The Smith Law aims at the incidental, and not as it should, at the fundamental things.

> "I have been engaged in research work in the matter of foods for twenty years and for fifteen years for the federal government. The government committee, of which I am a member, has been endeavoring to define bread and to set up standards of composition, but no conclusion has yet been reached, and the matter is still under investigation. The most important question is that of moisture content in bread, because it is the most important thing in connection with setting a standard for bread, as the moisture content varies greatly; and for the protection of the public the idea is to standardize the process and have a maximum moisture content if that can be done. The committee has reached the conclusion that it is not possible to establish a standard by reference to moisture content, but on the contrary the committee has concluded that the only fair standard will be to state the amount of dry matter which will be contained in bread. For instance, that a loaf labeled one pound in weight shall contain not less than, say 60 per cent of dry matter, so then it won't make any difference whether the loaf

labeled one pound is fresh or dry if it is ascertained that it contains the 60 per cent of dry matter. The committee is trying to establish a workable standard and a workable definition for bread" (T. 37, Dr. Harry E. Barnard).

Is it not better under all the circumstances to await the results of the investigation being made by the United States government, which aims to frame such a law as will not only be legal, but will also preserve for the American people the solid nutrient qualities in bread, irrespective of the uncontrollable conditions affecting the moisture content, which moisture content is, in the nature of things, constantly variable and beyond the restraining or regulating power of the baker?

"The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are declared to be entitled to different privileges, under the same conditions."

Soon Hing v. *Crowley*, 113 U. S. 703, 709, 5 Sup. Ct. 730.

"And what is it to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an intention in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there was an intention to treat differently or to discriminate."

Louisville & N. R. Co. v. *Bosworth*, 230 Fed. 191, 207.

"The constitutional right to the equal protection of the laws means that every one is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation."

Standard Oil Co. v. *Red River Parish Police Jury*, 140 La. 42, 47, 72 S. 802.

"But while classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification. It is claimed that such is the effect of the present law, and we can see no escape from the conclusion. People in the same class are subject to different rules * * *."

Black v. *State*, 113 Wis. 205, 89 N. W. 522, 528.

"Equal protection of laws must certainly mean equal security or burden, under the laws, to every one similarly situated.

"A statute, to escape condemnation as infringing the rights guaranteed by this amendment, must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity; otherwise, there would be unjust discrimination, which this constitutional mandate prohibits."

In re Von Horne, 74 N. J. Eq. 600, 70 Atl. 986.

The Whole Act Must Fail.

And the prescription of a maximum tolerance in weight is such an integral part of the whole act that regardless of the validity of any other portion, the whole act must fail.

The title and body of the Smith Bread Law indicates that the legislature as much intended to attempt to fix a maximum as a minimum weight.

> "Where portions of an act are invalid * * * the whole act must be declared void if it is apparent from an inspection of the act itself that the invalid portions formed an inducement to its passage."
>
> Per Irvine, C., in *Trumble* v. *Trumble*, 37 Neb. 340, 55 N. W. 869.

> "When the invalid part of an act influenced or induced the passage of the residue, the entire act will be declared void."
>
> *State* v. *Poynter*, 59 Neb. 417, 81 N. W. 431.

> "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced."
>
> *State* v. *Junkin*, 85 Neb. 1, 122 N. W. 473.

The act of the Nebraska legislature not only fixes a minimum weight, but it definitely imposes a limitation upon maximum weight also, namely a two ounce excess tolerance for each pound loaf. To sell bread in excess of the tolerance is as much a criminal offense as to sell it in deficiency of the minimum. The title of the bill is "A Bill For An Act Establishing A Standard Weight Loaf of Bread * * *," not "A Bill For An Act to Establish a Minimum Weight Loaf of Broad * * *." So far as the language of both title and body of the act indicate, the legislature as much intended to prescribe a maximum as a minimum weight.

The attempt to limit the maximum weight is an unreasonable and void regulation, as shown herein. A baker's right to sell his product can not be curtailed merely because his bread chances to come out of the oven weighing 19 ounces instead of 18; nor would such a circumstance endanger public health, safety or morals, or in any way serve to defraud.

If the legislative intendment was to fix a definite weight loaf, as the language of the act indicates and not merely to prescribe a minimum, then *arguendo*, under the principle that the fixing of a maximum was as much an inducement to the passage of the act as the fixing of a minimum, the whole act must be declared invalid.

VIII.

RECAPITULATION.

The Smith Bread Law is bad because:

1.

The police power of the state can only be invoked where the law enacted is for the protection of the safety, morals or welfare of the people; and the Smith Law is not in that category.

2.

Fixing the maximum weight for a given loaf of bread does not in any way affect the safety, morals, or welfare of the people, and neither does such maximum weight afford any protection to the purchaser and consumer.

3.

The law is violative of the Federal and State Constitutions in that it deprives our citizens, or a class thereof, of their property without due process of law; it abrogates the constitutional right of private contract without any just ground therefor, and it dĕnies to our citizens the equal protection of the law.

4.

The law is arbitrary, unreasonable, oppressive, unwarranted and unworkable, because the evidence is clear that the bread which is demanded by the people today and which is being furnished them by the bakers, cannot be made every day in the year within the limits provided in such law.

5.

The maximum weight limit is arbitrary and capricious, and is not based upon the morals, health or safety of the people, because the shrinkage in weight of a loaf of bread after baking is caused by the evaporation of moisture, which evaporation does not change the food value of the loaf in the slightest degree, so the consumer gets as much food value (solid matter) at the end of the twenty-four hour period as he would have gotten had he purchased the loaf when it came from the oven and before it had sustained any evaporation.

6.

The law is not only *not* helpful to the people—it is positively detrimental. It is very clearly shown in the

evidence that the better the quality of bread, the greater is the evaporation of moisture; and as self-preservation is the first law of nature, it needs no argument to show that the bakers under the Smith Law, in order to be on the safe side, will make a poorer grade of bread than they otherwise would make, because they will thus run less chance (though the chance is only lessened in degree and not fully) of making illegal loaves; and the poorer the quality of the bread, the less in food value does the consumer get.

7.

The law is detrimental to the consuming public, because on an increase in the price of ingredients (flour, yeast, sugar, milk, malt, etc.) the baker, owing to stabilized prices *must reduce the quality to* obtain the same measure of profit as he had before the increase in the price of the ingredients.

8.

The law is detrimental because on a decrease in the price of flour, the consumer will get no benefit *until that decrease reaches $3.00 per barrel*, as we have no unit of money less than one cent; whereas at the present time and under present laws, the consumer is immediately given the benefit of a slight decrease in the price of ingredients by a corresponding increase in the size of the loaf.

We, therefore, earnestly urge that the decisions of the District Court for Lancaster county, Nebraska, and of the Supreme Court of Nebraska, were and are errone-

ous, and that the Smith Bread Law is, and should be declared invalid, and that plaintiff's in error are entitled to the injunction as prayed in the bill.

Respectfully submitted,

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Omaha, Nebraska,
September 15, 1923.

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Number 522.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

JAY BURNS BAKING COMPANY AND OTHERS, PLAINTIFFS IN ERROR,

V.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND GRANT L. SHUMWAY, AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF NEBRASKA, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

O. S. SPILLMAN, Attorney General
of the State of Nebraska,
Lincoln, Nebraska,
Attorney for Defendants in Error.

LLOYD DORT, Assistant Attorney General,
Of Counsel.

STATEMENT.

The present Governor of Nebraska, Hon. Charles W. Bryan, and the present Secretary of the Department of Agriculture,

Hon. Grant L. Shumway, have been substituted as parties in lieu of the former officials.

The Nebraska legislature, in 1921, enacted Chapter 2, Laws 1921, which for convenience is designated herein as the "Bread Law." This act is as follows, viz:

> "AN ACT establishing a standard weight loaf of bread for the State of Nebraska and providing a penalty.
>
> "Be It Enacted by the People of the State of Nebraska:
>
> "Section 1. It shall be the duty of the Department of Agriculture to enforce all provisions of this Act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this Act.
>
> "Sec. 2. Every loaf of bread made or procured for the purpose of sale, sold, exposed or offered for sale in the State of Nebraska shall be the following weights avoirdupois, one-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.
>
> "Sec. 3. A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not be less than the minimum nor more than the maximum prescribed by this Act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale.
>
> "Sec. 4. Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine

of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days. Provided, however, that upon the second and all subsequent convictions for the violation of any of the provisions of this Act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days.

"Approved March 31, 1921."

Bill For an Injunction.

This law became operative July 29, 1921. Upon July 12, 1921, Jay Burns Banking Company and other bakers, for themselves and all others interested, filed their bill for an injunction (Trans. 2). The purpose of the action was to enjoin the enforcement of this law and to have the same declared invalid and unconstitutional.

Alleged Violations of the Constitution of the United States.

1. It is contended that the Nebraska Bread Law violates Section 1 of the 14th Amendment to the Constitution of the United States, as follows:

> "No state shall make or enforce any law which shall * * * deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Trans. 11).

2. That the Bread Law denies to the citizens of the state of Nebraska the equal protection of the law and their constitutional freedom of contract (Trans. 12). The allegation apparently refers to the Nebraska constitution (Trans. 12). Possibly it is intended to allege a violation of Section 10, Article I, Constitution of the United States.

Alleged Violations of the Constitution of Nebraska.

It is alleged that this law violates the provisions of the Constitution of Nebraska in several respects:

1. Section 3, Article I, of the Constitution of Nebraska, is as follows:

> "No person shall be deprived of life, liberty or property, without due process of law" (Trans. 12).

2. Article I of the Bill of Rights, pertaining to natural and inalienable rights, life, liberty and the pursuit of happiness (Trans. 12).

3. Section 14, Article III, as follows:

> "No bill shall contain more than one subject, and the same shall be clearly expressed in the title" (Trans. 12).

The bill recites that plaintiffs have no adequate remedy at law; that a multiplicity of suits will result; that plaintiffs will suffer unmeasurable damage and irreparable injury to their business and property if the law is enforced (Trans. 12, 13).

It is contended:

1. That the said law unlawfully deprives appellants of vested property rights without compensation.

Reference is made to the business developed by the Petersen & Pegau Baking Company in building up the public demand for a loaf of bread designated a "twin loaf." This loaf consists of two loaves joined and baked together as one loaf. It is contended that this business will be destroyed because the law does not provide for a loaf of this weight and shape (Trans. p. 9, par. 27).

Reference is likewise made to a special loaf baked for the railroad dining car service (Trans. 10, par. 28). And to a special loaf baked for restaurant trade (Trans. 10, par. 29).

Paragraph 31 (Trans. 11) avers that this law will require a change in equipment of the bakeries with consequent loss and expense.

2. That it is impossible to enforce the law uniformly and without discrimination between appellants and the small bakers and non-resident bakers.

Appellants fear that non-resident bakers and those who handle their products cannot be reached by the law because the weight of the loaves is to be determined by the average weight of 25 loaves (Trans. 7, par. 23).

It is stated that competition with non-resident bakers will require Nebraska bakers to make different size loaves to sell in other states and that this will be at an increased and useless expense. Also delayed and transferred or canceled shipments of bread consigned to other states cannot be disposed of in Nebraska (Trans. 10, par. 30).

3. That there is no necessity for the law.

Because the bread buying public has shown no dissatisfaction. The demand is for high quality rather than the weight or size of the loaf and this demand is met (Trans. 5, par. 13).

Because standard prices of 10c and 15c have been maintained practically all the time. If the loaf should increase but a fraction of a cent the price must be increased a full cent—the split cent question (Trans. 5, par. 20).

Because the split-cent doctrine would prevent consequent public benefit from a reduction given upon a barrel of flour which would produce 300 loaves of bread weighing one pound each. Hence no reduction of less than $3.00 per barrel could be given (Trans. 7, par. 21).

Because it would be necessary to lower the quality of bread upon an increase of raw materials (Trans. 7, par. 22).

Because loaves baked from equal weight of dough have equal food value although when baked some may weigh less than others (Trans. 7, par. 19).

4. That the bread law was not passed under a proper exercise of the police power and has no relation to the public welfare or health (Trans. 12, par. 32).

5. That the said law is unreasonable and impossible to obey, is arbitrary and oppressive (Trans. 12, par. 32).

(a) Because of the varied demands of customers (Trans. 4, par. 14; Trans. 8, par. 24; Trans. 9, par. 26).

(b) Numerous and varied ingredients (Trans. 5, par. 14).

(c) Natural conditions beyond the baker's control—humidity, temperature, etc. (Trans. 5, par. 15).

(d) Difficulty in obtaining uniform heat in oven (Trans. 5, 6, par. 16).

(e) Evaporation in baking (Trans. 5, par. 15; Trans. 6, par. 16).

(f) Evaporation after baking—water and gas (Trans. 6, par. 18; Trans. 8, par. 24).

(g) Impossibility of governing fermentation (Trans. 5, par. 15).

(h) Impossibility of exactly scaling dough (Trans. 6, par. 17).

(j) Loss in scaling dough (Trans. 6, par. 18).

ANSWER.

The answer admits the allegations of the petition as to the officials named, the passage of the bread law and that a violator thereof is subject to criminal prosecution. It avers that the plaintiffs have a full and adequate remedy at law.

The last paragraph is a general denial of the allegations of the petition not expressly admitted to be true (Trans. 16, 17).

REPLY.

The reply is a general denial (Trans. 18).

DECREE.

"This cause having been heretofore submitted to the court, now comes on for final determination, and the court being fully advised in the premises, finds generally in favor of the defendants, and against the plaintiffs; finds that the plaintiffs are not entitled to the relief prayed for, and that the temporary injunction heretofore entered herein be dissolved and action dismissed at costs of plaintiffs, to all of which plaintiffs each severally except.

"It is therefore considered, ordered and adjudged by the court that the temporary injunction heretofore entered herein be and hereby is dissolved, and that this case be and hereby is dismissed at the costs of the plaintiffs, Jay Burns Baking Company, Petersen & Pegau Baking Company, Federal System of Bakeries of Omaha, Charles W. Ortman and James L. Pettys, for themselves and all other interested, taxed at $....., for which execution is hereby awarded. Supersedeas bond fixed at the sum of $1,000.00, and forty days from rising of court allowed in which to settle bill of exceptions."

Judgment of the Supreme Court of Nebraska.

An appeal was taken to the Supreme Court of Nebraska, which affirmed the judgment of the district court (Trans. 128).

The opinion is set forth beginning on page 128 of the transcript.

ASSIGNMENT OF ERRORS.

Errors assigned and relied upon by the bakers are as follows (Trans. 135):

1. That said law and especially said Sections 2 and 3 thereof violate Section 1 of the 14th Amendment to the Constitution of the United States.

2. That said law and especially Sections 2 and 3 thereof deprive plaintiffs and others similarly situated of their liberty or property without due process of law.

3. That said law denies equal protection of the laws.

4. That said law impairs the obligation of contracts, contrary to Section 10, Art. I of the Federal Constitution.

5. That said law abridges the privileges and immunities of citizens, contrary to the provisions of the 14th Amendment to the Federal Constitution.

THE EVIDENCE.

For Plaintiffs.

DR. HARRY SNYDER:

Expert chemist with Russell-Miller Milling Company, Minneapolis (Trans. 20).

Flours which have the largest amount of gluten make the best bread or that which has the highest food value. The more gluten in the flour the greater the amount of water required. The more water the greater evaporation and variation in weight (Trans. 20).

The variation in weight is according to the moisture content, but the nutritive value is the same (Trans. 21).

He testified that wheat varies in its gluten content. The public demand is for the best quality (Trans. 22).

He found that a loaf of bread weighing 18 ounces when it came from the oven would lose 2 1/5 ounces on the average (Trans. 22).

He states it is impossible to bake bread to comply with the law. The principal obstacles being temperature and humidity (Trans. 22).

He refers to certain experiments upon which his conclusions are based, but gives no details (Trans. 23).

CROSS EXAMINATION.

He did not do the baking, but was present with his expert bakers. They were not attempting to obtain any specific results. The bread was unwrapped. They were not attempting to comply with the provisions of any special law. They were not seeking to determine whether they could bake merchantable bread within the tolerance of 2 ounces per pound. It was purely a scientific investigation (Trans. 24).

When the tests were made he did not have in mind whether or not he could comply with any law as to maximum and minimum weights. He would not attempt to say whether he could or could not comply with the law (Trans. 25). He states, "I do not say it is impossible, but I think you would not get a product that you could really call bread" (Trans. 25).

Waxed paper retards evaporation (Trans. 26).

"A baker can control the humidity and the temperature of his dough room and of his baking room, that is, in the big plants, but when the bread leaves the oven it is no longer under control. The inequality of the law arises in the fact that there is not enough leeway between the weight when baked and the weight 24 hours thereafter, because of the uncontrollable facts in the drying process" (Trans. 27).

"I think you can make something, but you can't call it good bread. You can make a product which might suggest bread, but it would not be real bread" (Trans. 28).

JAY BURNS:

Starch cells in flour must be ruptured by moisture and at to make good bread (Trans. 28, 29).

The percentage of evaporation in the oven does not depend solely upon the per cent of water in the dough. The amount of water has not anything to do with the time of baking. Shipments of bread, local and foreign, are frequently made of less than 25 loaves of the same unit (Trans. 30).

Humidity in some bakeries is partly controlled by machines (Trans. 30).

The Jay Burns Baking Company ran the following advertisement in the Omaha Bee, March 14, 1913 (Trans. 126, 127):

> "We actually Manufacture Our Own Weather at Our Bakery!
>
> "The weather has always been a hard master to the baker. On clear days when the air is fresh the dough raises fine. But on a damp, heavy day the dough refuses to act just right and the bread is not up to quality.
>
> "With the aid of the wonderful apparatus shown above we have absolute control over weather conditions in all parts of our wonderful bakery.
>
> "No matter whether the sun is shining or the rain is pouring down, no matter whether the sultry breezes of summer or the icy blasts of winter constitute the weather out of doors, inside the dough-room at the Burns Bakery the air will always be just the right temperature.
>
> "* * * This purified air is automotically tested. If too dry, moisture is added, if too damp, this air is dried; if two warm, it is cooled by refrigeration; if too cool, it is warmed by steam. Day in and day out, the temperature and relative humidity of the air discharged from this 'humidifier' varies less than two per cent."

Bread made from graham or whole wheat flour will dry more quickly than that made from the patent flour (Trans. 31).

The price of the loaf before enactment of the bread law remained the same and the size of the loaf has been changed to meet the increase or decrease in cost (Trans. 32).

This witness discussed various things connected with bread, its uncertainty, and recited results of tests made. He also testified upon the split-cent proposition and the special loaves baked for diners and restaurants (Trans. 33). Certain investments in material and equipment will be a loss. The twin loaf cannot be successfully marketed under the bread law (Trans. 34).

Bread of the present quality cannot be made under the bread law. The product would not be marketable (Trans. 35).

No experiments were made with a view to producing a product which would comply with the weights prescribed in the bread law (Trans. 35).

It is possible that with a twin loaf weighing 1½ pounds the two parts of the loaf can be split by unscrupulous grocers, re-wrapped and sold as separate loaves (Trans. 35).

The objections raised in this case were presented to the legislature.

> "I have never manufactured a product to comply with the bread law to determine what its condiments would be or its character as a manufactured product" (Trans. 35).
>
> "It is possible and I have been accustomed in times past to increase or diminish the finished product put upon the market within a variance of one ounce or possibly two ounces of a loaf previously produced" (Trans. 36).
>
> "I remember the bread produced in court concerning which it was testified to have been baked under ordinary conditions and to comply with the law and that product would ordinarily and customarily be known to the public as bread" (Trans. 36).

DR. HARRY E. BARNARD:

He discussed the difficulties encountered in the baking of bread from a scientific viewpoint. He states that it is not

possible for the baker to control the evaporation, temperature, humidity and conditions under which bread is handled.

He says the 2 ounce tolerance is too narrow (Trans. 36). In the commercial baking of bread the law cannot be complied with (Trans. 38). Based on laboratory tests (Trans. 39).

CROSS EXAMINATION.

It is possible to control the temperature of the room and of the oven within limits (Trans. 37).

> "Bread might be made which would fall within the limits of the Smith Bread Law, but it would not be what we call commercial bread" (Trans. 39).

In experimental work a loaf of bread was baked which from the time of the scaling weight until it came out of the oven lost less than one-eighth of an ounce. In keeping bread 24 hours the average loss was less than 2 ounces. Some loaves lost very little. 45 loaves kept unwrapped for 24 hours showed an average loss of 1.64 ounces (Trans. 40).

LOUIS W. HAAS:

Bread making expert. He prepared Exhibit 4. In these experiments the humidity and temperature were controlled. But a bakery could not maintain these conditions (Trans. 40).

He thinks there would be a greater shrinkage than two ounces per pound in the operation of a bakery. His experiments so demonstrated (Trans. 41).

CROSS EXAMINATION.

Never made any experiments in an attempt to comply with the Chicago ordinance (Trans. 41).

The first loaf in his tests weighed 18½ ounces in the oven, 16½ ounces when it came out and lost 1.28 ounces in the 24 hour period. If more than 18½ ounces of dough had been

used it probably would have weighed not less than 16 ounces at the end of the 24 hour period.

"The reason my tests did not comply with the law is that I did not put enough dough in the loaf. The loaves weighed 16½ ounces when they came from the oven and none of them complied with the law" (Trans. 43, 44).

PETER G. PIRRIE:

Head of the baking department of the Dunwoody Institute, Minneapolis.

Making of bread is uncertain. There is no way to predetermine the weights.

CROSS EXAMINATION.

"In making my experiments I did not start out with the effort to make a loaf of bread which would weigh not less than 16 ounces, nor more than 18 ounces during the 24 hour perior after baking" (Trans. 44).

"We were not making any special effort to produce a loaf that would comply with the law" (Trans. 45).

REDIRECT EXAMINATION.

The uncertain elements beyond the control of the baker are:

1. Evaporation in raw materials and in their storage.

2. A baker can only approximately, in any event, control temperature and humidity.

3. Errors which creep into the weighing and measuring of ingredients for the dough.

4. Loss in mixing.

5. Impossibility of accurately controlling temperature and humidity during fermentation of the dough.

6. Loss during fermentation because of the nature and the proportion of the ingredients in the dough.

7. Conditions existing in and about dough dividing.

8. Changes in weight by evaporation or absorption in handling the balls of dough after being weighed or divided and until they go into the baking pan.

9. Evaporation during the proving process.

10. Changes during the baking process in the oven.

11. Losses after bread leaves the oven and is transported by mechanical devices to some other part of the plant for cooling.

12. Uncontrollable weather conditions after the bread is baked.

13. Loss in handling the bread on shelves, racks, or in boxes, etc.

RE-CROSS EXAMINATION.

> "I could produce a product which would comply with the Smith Bread Law and my competitors could do likewise, but the product would not be salable. It would not be wholesome bread and it would not serve the purpose of bread" (Trans. 46).

CHARLES W. ORTMAN:

Retail baker of Omaha. At times he could comply with the law, but sometimes could not. Atmospheric conditions and changes in ingredients are beyond control (Trans. 46).

Does not think 75% of the daily run will comply with the law (Trans. 47).

Dispose of their bread in from three to five hours after baking. Most of it during that period would comply with the law.

Loaves weighed by him consisted of five or ten in number picked up at random at the end of 24 hours (Trans. 47).

AUGUST LOUIE:

General manager of Skinner Baking Company, a non-resident bakery. They ship bread into Nebraska in less than 25 loaf lots (Trans. 47).

CROSS EXAMINATION.

In case of accident the loaves might show a difference of two ounces.

"We regulate the weight of the loaf according to the cost of the ingredients. Pockets of machinery occasionally get out of order" (Trans. 48).

MILTON PETERSEN:

General manager of Petersen & Pegau Baking Company. They ship to 462 towns in seven states. Many shipments of only 20 loaves of one unit (Trans. 48).

One-third of their output is unwrapped. Wrappers retain moisture. Unwrapped bread evaporates much faster (Trans. 48).

"To be absolutely sure to produce a loaf weighing not less than 16 ounces during the 24 hour period, the dough would have to be scaled at 20 ounces" (Trans. 49).

He testified to certain records of baking tests which showed no compliance with the law (Trans. 50, 51).

CROSS EXAMINATION.

"In making the tests we did not bake a twin loaf nor did we make any tests seeking to produce a product which would comply with the Smith Bread Law.

"The objection to the twin loaf of half pound units is the cost of production and its drying out quality" (Trans. 52).

C. J. HELFRICH:

In using a brick oven the first loaves put in are the last out and thus are exposed to heat longer and evaporation is disproportionate. Impossible to scale a loaf to determine its weight after baking (Trans. 52).

C. S. JARNAGIN:

Master baker with Jay Burns Baking Company. Expert baker.

Eighteen ounce loaf loses 2¼ to 2½ ounces by evaporation.

CROSS EXAMINATION.

He made two or three experiments where the batch of bread complied with the law. He never made any tests with the intention of trying to obtain a product which would comply with the law regardless of the quality of such product. The bread in the experiments was unwrapped (Trans. 53).

The court and lawyers selected as the best bread, No. 2, a loaf made from 80% flour and 20% cornstarch. Witness says the other loaf of best quality flour is the best bread (Trans. 53, 54).

> "I wouldn't say that I could bake a quality of bread equivalent to No. 2, which would comply with the Smith Bread Law, but it will come nearer complying with the law, but I never experimented on those lines."

I have never made any tests with the intention of obtaining a product which would comply with the law. No evaporation tests were made on No. 2 bread (Trans. 54).

P. O. L. PETERSEN:

Superintendent of Petersen & Pegau Baking Company.

Refers to certain tests:

> "We were not able to comply with the Smith Bread Law in all of these experiments, but in most of them. Bread was unwrapped" (Trans. 54).

He was not told what results it was desired to obtain. Made no experiments to see if it would be possible to scale a certain amount of dough which would be within the 16 and 18 ounces after baking (Trans. 55).

He was instructed how to conduct the experiments and to scale 21 ounces. Did not conduct the experiment according to his own ideas to determine the amount of dough to scale or whether it would be possible to comply with the law (Trans. 55).

Certain affidavits are referred to which recite the opinions of a number of persons, that the bread law cannot be obeyed because of impossibility of compliance (Trans. 55, 56).

Undisputed Facts.

The experiments conducted by plaintiffs were not made in an attempt to comply with the law. They did not attempt to bake a product that would meet the provisions of the law. But when they scaled 19 ounces of dough and kept the bread under ordinary conditions it was within the law (Trans. 115, 116).

Defense.

WILLIAM H. CLUETT:

Chief Deputy Inspector of Weights and Measures for Chicago.

Under the new ordinance, Exhibit C, the tolerance is one ounce per pound under, or one ounce over, the 16 ounces. Exhibit B was the old ordinance and gave but one ounce tolerance. The bakers were able to bake their bread within the one ounce tolerance. Frequent inspections were made and very few violations were found. There was very little trouble in complying

"I think the bakers can comply with the law by paying proper attention to the scaling of their dough before it

goes into the oven. I think a two ounce tolerance is large."

Most of the trouble with the bakers has been mislabeling (Trans. 56).

"The reason we cut out the three-quarter pound loaf under Exhibit C was because its weight is hard to test by the eye and you have to put it on a scale to tell the difference between it and a pound loaf" (Trans. 57).

It was a fraud upon the public to permit sales of the three-quarter pound loaf (Trans. 59).

J. W. LONG:

Inspector of weights and measures of Omaha. Weighed bread and made reports shown on Exhibits 1 and 2. At that time the 15 cent loaf weighed 17½ ounces. Found only one that did not (Trans. 60).

THOMAS J. DUNN:

Assistant inspector and helped Mr. Long with tests shown by Exhibits 3, 4 and 5 (Trans. 60).

GEORGE J. WEILER:

Baker with Lett Baking Company. Experimented to see if they could bake a 1½ pound loaf which would not be less than 24 ounces nor more than 27 ounces. Results shown by Exhibit 22. The greatest weight out of the oven was 26¼ ounce, and the least was 25 ounce. 28 ounce dough was scaled. Bread was wrapped. At the end of 24 hours the greatest weight was 25¼ ounces and the least 24¾ ounces. Paid no attention to humidity or temperature (Trans. 61).

The tests (Trans. 120, 121, 122, 123) follow:

BREAD BAKED AT LETT BAKERY, LINCOLN, NEBRASKA
Oct. 20, 1921
Wrapped Bread—Test 1½ Pound Loaves

Loaf No.	Weight scaled	Weight when baked	Baking loss	Weight 24 hours after baking	Shrinkage 24 hours after baking
1	28 oz.	26¼ oz.	1¾ oz.	25¼ oz.	1 oz.
2	28	26	2	25¼	¾
3	28	25¾	2¼	25	¾
4	28	25½	2½	25	½
5	28	25¾	2¼	25	¾
6	28	25½	2½	25	½
7	28	26	2	25¼	¾
8	28	26	2	25½	½
9	28	25¾	2¼	25½	¼
10	28	25¼	2¾	24¾	½
11	28	25½	2½	25¼	¼
12	28	25¾	2¼	25¼	½
13	28	25	3	24¾	¼
14	28	25¾	2¼	25¼	½
15	28	25½	2½	25	½
16	28	15¼	2¾	25	¼
17	28	25½	2½	25	½
18	28	25½	2½	25¼	¼
19	28	25¼	2¾	25	¼
20	28	25½	2½	25	½
21	28	25½	2½	25¼	¼
22	28	25¼	2¾	25	¼
23	28	25	3	24¾	¼
24	28	25¾	2¼	25	¾
	672	613¾	58¼	603¼	11½

Average loss in baking..... 2.427 oz.
Average loss in 24 hours..... .48 oz.
Average wt. at baking..... 25.57 oz.
Average wt. 24 hours later..... 25.135 oz.
(Trans. 120, Exhibit 22)

GRAHAM BREAD BAKED AT LETT BAKERY, LINCOLN, NEB.
Oct. 21, 1921
Wrapped Bread—Test Pound Loaf

	Dough scaled	Baked weight	After 24 hrs.
1	19	18	17½
2	19	18	17½
3	19	17¾	17¾
4	19	18	17½
5	19	17½	17¾
6	19	....	17¼
7	19	17¾	17½
8	19	18	17¾
9	19	17½	17¼
10	19	17¾	17¼
11	19	18	17¾
12	19	17½	17¼
13	19	17¾	17½
14	19	17¾	17½
15	19	18	17½
16	19	17¾	17½
17	19	17½	17
18	19	17¾	17½
19	19	17½	17
20	19	17¾	17½
21	19	17¾	17½
22	19	17½	17
23	19	17¾	17½
24	19	17¾	17½
	Average 19	Average 17⅛	

Average shrinkage in baking..... 1⅞ oz.
Average loss after baking in 24 hours.... .323 oz.
(Trans. 121, Exhibit 26)

EXPERIMENTS IN BREAD BAKING AT LETT BAKING COMPANY, LINCOLN, NEBRASKA

July 22, 1921

Loaf No.	Weight scaled	Weight when baked	Shrinkage in oven	Weight 24 hours after	Shrinkage in 24 hours
1	19 oz.	17¼ oz.	1¾ oz.	16⅞ oz.	⅜ oz.
2	19	18	1	17½	½
3	19	17⅝	1⅜	17¼	⅜
4	19	17⅜	1⅝	17	⅜
5	19	17½	1½	17	½
6	19	17¼	1¾	16¾	½
7	19	17½	1½	17⅛	⅜
8	19	17½	1½	17	½
9	19	17¼	1¾	16¾	½
10	19	17¾	1¼	17¼	½
11	19	17	2	16⅝	⅜
12	19	17⅜	1⅝	16⅞	½
13	19	17¼	1¾	16¾	½
14	19	17¼	1¾	16⅞	⅜
15	19	17¼	1¾	16¾	½
16	19	17¼	1¾	16⅞	⅜
17	19	17	2	16⅝	⅜
18	19	17⅛	1⅞	16¾	⅜
19	19	17⅛	1⅞	16¾	⅜
20	19	17	2	16⅝	⅜
21	19	17¼	1¾	16⅞	⅜
22	19	17⅛	1⅞	16⅞	¼
23	19	17	2	16⅝	⅜
24	19	17⅛	1⅞	16¾	⅜
25	19	17	2	16⅝	⅜
26	19	17	2	16⅝	⅜
27	19	17	2	16⅝	⅜
28	19	16¾	2¼	16⅜	⅜
29	19	16¾	2¼	16½	¼
30	19	17⅛	1⅞	16¾	⅜
31	19	17⅛	1⅞	16¾	⅜
32	19	17⅛	1⅞	16¾	⅜
			57 oz.		12.8 oz.

Average shrinkage in oven, 1 7 oz. Average shrinkage 4/10 oz. 24 hrs. after baking

(Trans. 122, defendant's Exhibit 9)

Vernon G. Zeimer and Harley Metz assisted in the foregoing tests and testify to the correctness of the tabulated results (Trans. 62, 63).

JOHN WHISTLER:

Baker with the Sunlight Bakery.

Experimented to see if he could bake bread which after 24 hours would not be less than 16 ounces nor more than 18

ounces in weight. Exhibit G contains the result of the test. Unwrapped bread (Trans. 124).

The tabulated tests follow:

EXPERIMENTS IN BREAD BAKING AT LETT BAKING COMPANY, LINCOLN, NEBRASKA
July 23, 1921

Loaf No.	Weight scaled	Weight when baked	Shrinkage in oven	Weight 24 hrs. after	Shrinkage in 24 hrs.
1	19 oz.	17 oz.	2 oz.	16¾ oz.	¼ oz.
2	19	16½	2½	16¼	¼
3	19	16¾	2¼	16½	¼
4	19	16¾	2¼	16½	¼
5	19	17	2	16¾	¼
6	19	17	2	16¾	¼
7	19	16½	2½	16¼	¼
8	19	16¾	2¼	16½	¼
9	19	17	2	16¾	¼
10	19	17	2	16⅞	⅛
11	19	16¾	2¼	16¾	⅛
12	19	17	2	16¾	¼
13	19	17	2	16¾	¼
14	19	17⅛	1⅞	17	⅛
15	19	17	2	16¾	¼
16	19	16¾	2¼	16⅝	⅛
17	19	16¾	2¼	16½	¼
18	19	17	2	16¾	¼
19	19	16¾	2¼	16½	¼
20	19	17	2	16¾	¼
21	19	16¾	2¼	16⅝	⅛
22	19	17	2	16¾	¼
23	19	17	2	16⅞	⅛
24	19	16¾	2¾	16⅝	⅛
25	19	17	2	16⅞	⅛
26	19	17¼	1¾	17	¼
27	19	16¾	2¼	16½	¼
28	19	16¾	2¼	16⅝	⅛
29	19	17	2	16¾	¼
30	19	16½	2½	16⅜	⅛
31	19	17	2	16⅞	⅛
32	19	17	2	16⅞	⅛
			68¼ oz.		7 oz.

Average shrinkage in oven, 2.1 oz. Average shrinkage 2/10 oz. 24 hrs. after baking

(Trans. 123, Defendant's Exhibit 13)

UNWRAPPED BREAD—EXPOSED TO AIR
LOAVES OF BREAD BAKED AT SUNLITE BAKERY, LINCOLN,
July 23, 1921

Loaf No.	Weight scaled	Weight when baked	Shrinkage in oven	Weight 24 hours after	Shrinkage in 24 hours
1	18 oz.	17¾ oz.	¼ oz.	17 oz.	¾ oz.
2	18	17	1	16	1
3	18	17	1	16	1
4	18	17	1	16	1
5	18	17½	½	16⅜	1⅛
6	18	17	1	16½	½
7	18	17¾	¼	17	¾
8	18	17½	½	17	½
9	18	17¾	¼	16⅜	1⅝
10	18	17½	½	17	½
11	18	17	1	16¼	¾
12	18	17¾	¼	17	¾
13	18	17	1	16	1
14	18	16½	1½	16	½
15	18	17	1	16	1
16	18	17	1	16¼	¾
17	18	17	1	16¼	¾
18	18	17½	½	16¼	1¼
19	18	17	1	16¼	¾
20	18	17	1	16 2/8	¾
21	18	17¾	¼	17	¾
22	18	17½	½	17	½
23	18	17¾	¼	16¼	1½
24	18	17½	½	17	½
25	18	17¾	¼	17	¾
26	18	17½	½	17	½
27	18	16	2	15½	½
28	18	16½	1½	16	½
29	18	17¾	¼	17	¾
30	18	17½	½	16¼	¾
			22½ oz.		24½ oz.

Average shrinkage in oven, ¾ oz. Average shrinkage 24 hrs. after baking .8 oz.

(Defendant's Exhibit "G," Trans. 124)

UNWRAPPED BREAD
BREAD BAKED BY SWOBODA BAKERY COMPANY,
OMAHA, NEBRASKA
July 23, 1921

Loaf No.	Weight scaled	Weight when baked	Oven loss	Weight 24 hours after baking	Shrinkage in 24 hours after baking
1	18 oz.	16½ oz.	1½ oz.	16⅛	⅜ oz.
2	18	16¼	1¾	16	¼
3	18	16⅛	1⅞	15⅞	⅛
4	18	16¼	1¾	16	¼
5	19	17¼	1¾	17	¼
6	19	17½	1½	17⅛	⅜
7	19	17¼	1¾	17	¼
8	19	17½	1½	17⅛	⅜
9	18½	16¾	1¾	16½	¼
10	18½	16¾	1¾	16⅜	⅜
11	18½	16½	2	16⅛	⅜
12	18½	16½	2	16⅛	⅜
13	17½	16	1½	15¾	¼
14	17½	16⅛	1⅜	15⅞	⅛
15	17½	16¼	1¼	16	⅛
16	17½	16	1½	15¾	¼

Average loss in oven 1.7 oz.
Average shrinkage 3/10ths of an ounce.
(Trans. 120, Exhibit of defendant)

A number of persons gave affidavits that under ordinary conditions in the ordinary bakery loaves of bread may be baked of any desired weight or with a tolerance of two ounces to the pound within the 24 hours after baking (Trans. 66).

See Exhibit H, a copy of an advertisement of Jay Burns Baking Company, wherein it is stated that the 15 cent loaf will be increased 4 ounces in size and the 10 cent loaf will be increased 2½ ounces (Trans. 127).

Exhibit 17 refers to the advertisement of Petersen & Pegau Baking Company:

> "Every breath of air that comes within the walls of any part of this great modern bakery is thoroughly washed and purified every ten minutes. The temperature likewise is controlled the year around. These details show to what care we go to insure the even quality of Hard Roll Bread" (Trans. 127).

Appellants made certain tests. We have segregated from their tests loaves which were baked or kept for 24 hours under moist, moderate and dry conditions respectively. It is to be noted that when thus segregated or when the total of all is taken that the loss is within the two ounce tolerance.

Summary as follows:

MOIST

EXPERIMENTS IN BEAD BAKING AT THE JAY BURNS BAKING PLANT, OMAHA, NEBRASKA

Same Loaves as Described in Tests Attached to the Petition

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hours after	Weight 8 hours after	Weight 16 hours after	Weight 24 hours after	Condition of atmosphere where bread kept	Shrinkage in 24 hours
				June 28, 1921					
	Oz.		Oz.	Oz.	Oz.	Oz.	Oz.		Oz.
1	21	10:30AM	18¼	18	17½	17	16½	Moist	1¾
4	20	10:30AM	17¼	17	16¾	16¼	15⅞	Moist	1⅜
				June 29, 1921					
1	21	9:30AM	18¼	18	17½	16¾	16½	Moist	1¾
4	20	9:30AM	18	17½	17¼	17	16¾	Moist	1¼
				July 1, 1921					
						12 hrs. later			
3 (1)	18½	5:00PM	16¾	16¼	15¾	15	15¼	Moist	1½
3 (2)	18½	5:00PM	16	15½	15		14¼	Moist	1¾
3 (3)	18½	5:00PM	15¾	15¼	14¾		14½	Moist	1½
Cool oven									
				July 3, 1921					
3 (1)	18½	3:30PM	16¾	16¼	15¾		15¼	Moist	1½
3 (2)	18½	3:36PM	16½	16	15½		15	Moist	1½
3 (3)	18½	3:36PM	16¼	15¾	15¼		14	Moist	1½
Cool oven, very humid atmosphere									
				July 4, 1921					
5	18½	8:30AM	16¼		15¾		15	Ext. Moist	1¼
6	18½	8:30AM	16½		16		15¼	Ext. Moist	1¼
				February 8, 1921					
3	18½	11:00AM	17⅛	16⅝			16⅜	Moist	¾
4	18½	12:10PM	16⅝	16⅛			15¼	Moist	1⅜
				February 9, 1921					
2	18½	8:15AM	16¾	16¼			15⅛	Moist	1⅝
5	18½	12:25PM	16½	16¼			15⅞	Moist	⅝
				February 10, 1921					
4	19	10:10AM	17½	16⅞			15¾	Moist	1¾
5	19	12:00M	17½	16¾			16⅜	Moist	1⅛
				February 11, 1921					
3	19	11:00PM	17⅞	17⅛			16⅞	Moist	1
4	19	4:00PM	17½	17⅛			16⅝	Moist	⅝
				February 13, 1921					
3	19	11:00AM	17½	17⅛			16⅞	Moist	⅝
4	19	2:20PM	17	17¼			16½	Moist	½
				February 14, 1921					
3	19	11:10AM	17⅛	16¾			16½	Moist	⅝
4	19	1:00PM	17¾	17¼			16⅜	Moist	1⅜

Total shrinkage on 24 loaves..... 29.8 oz.
Average shrinkage per loaf..... 1.2 oz.

MODERATE

EXPERIMENTS IN BEAD BAKING AT THE JAY BURNS BAKING PLANT, OMAHA, NEBRASKA

Same Loaves as Described in Tests Attached to the Petition

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hours after	Weight 8 hours after	Weight 16 hours after	Weight 24 hours after	Condition of atmosphere where bread kept	Shrinkage in 24 hours
				June 28, 1921					
	Oz.		Oz.	Oz.	Oz.	Oz.	Oz.		Oz.
2	21	10:30AM	18¼	17¾	17	16½	16¼	Medium	2
5	20	10:30AM	17¼	16¾	16½	16	15¾	Medium	1½
				June 29, 1921					
2	21	9:30AM	18¼	17¾	17¼	16½	16	Moderate	2¼
5	20	9:30AM	18	17¼	16¾	16¼	15¾	Moderate	2¼
				July 1, 1921					
							12 hrs. after		
2	1 18½	2:00PM	16½	16	15¾		15½	Medium M	1
	2 18½	2:00PM	15¾	15¼	15		14¼	Medium B	1½
	3 18½	2:00PM	16¾	16¼	15¾		15¼	Medium F	1½
Medium oven									
				July 3, 1921					
2	1 18½	12:00M	17	16½	16		15½	Moderate F	1½
	2 18½	12:00M	16¾	16¼	15¾		15¼	Moderate M	1½
	3 18½	12:00M	16½	16	15½		15	Moderate B	1½
Medium oven									
				February 8, 1921					
5	18½	3:10PM	16⅝	16			15⅞	Medium	1¾
6	18½	5:35PM	17½	16¾			15¾	Medium	1¾
				February 9, 1921					
1	18½	6:15AM	17⅜	16¾			16	Medium	1⅜
6	18½	5:35PM	17	16½			15⅛	Medium	1⅞
				February 10, 1921					
1	18½	6:20AM	17	16½			15⅜	Medium	1⅝
2	18½	8:10AM	16½	16¼			15⅞	Medium	⅝
				February 11, 1921					
5	19	5:45PM	17¼	16⅞			16⅛	Medium	1⅛
6	19	8:10PM	17¼	16¾			16⅛	Medium	1⅛
				February 13, 1921					
5	19	4:00PM	17	16¾			16⅛	Moderate	⅞
6	19	5:15PM	17	17			16½	Moderate	1
				February 14, 1921					
5	19	3:45PM	17¼	16¾			16⅜	Moderate	⅞
6	19	5:00PM	17	16½			16	Moderate	1

Total shrinkage in 22 loaves..... 31.5 oz.
Average shrinkage per loaf..... 1.43 oz.

DRY

EXPERIMENTS IN BEAD BAKING AT THE JAY BURNS BAKING PLANT, OMAHA, NEBRASKA

Same Loaves as Described in Tests Attached to the Petition

Test	Scaling weight of dough in each loaf	Time at which baked	Weight when baked	Weight 3 hours after	Weight 8 hours after	Weight 16 hours after	Weight 24 hours after	Condition of atmosphere where bread kept	Shrinkage in 24 hours
				June 28, 1921					
	Oz.		Oz.	Oz.	Oz.	Oz.	Oz.		Oz.
3	21	10:30AM	18¼	17¾	17	16¼	16	Dry	2¼
6	21	10:30AM	17¼	16½	16¼	15¾	15½	Dry	1¾
				June 29, 1921					
3	21	9:30AM	18¼	17¾	17¼	16¼	15¾	Dry	2½
6	20	9:30AM	18	17¼	16¾	16	15½	Dry	2½
				July 1, 1921					
							12 hrs. after		
1	18½	11:15AM	17	16½	16		15½	Dry	1½
2	18½	11:15AM	16¾	16¼	15¾		15½	Dry	1¾
3	18½	11:15AM	16½	16	15¼		14¾	Dry	1¾
Hot oven									
				July 3, 1921					
1	18½	8:00AM	17¼	16¾	16¼		15¾	Dry F	1½
2	18½	8:00AM	17	16½	16		15½	Dry F	1½
3	18½	8:00AM	16¾	16¼	15¾		15¼	Dry B	1½
Fresh oven									
				July 4, 1921					
1	18½	8:30AM	16½		16		14¾	Dry	1¾
2	18½	8:30AM	16¼		15¾		14¼	Dry	2
3	18½	8:30AM	16¾		16¼		14¾	Dry	2
4	18½	8:30AM	16¼		15½		14	Dry	2¼
				February 8, 1921					
1	18½	6:15AM	17¼	16⅝			16	Dry	1¼
2	18½	9:40AM	16⅞	16½			14½	Dry	2⅜
				February 9, 1921					
3	18½	6:15AM	16⅞	16¼			15¾	Dry	1⅛
4	18½	8:15AM	16⅞	16¼			14¼	Dry	2⅝
				February 10, 1921					
6	19	4:00PM	16⅝	16			15⅞	Dry	¾
7	19	6:00PM	17½	16⅞			15	Dry	1½
				February 11, 1921					
1	19	6:30AM	17⅝	16⅞			16⅜	Dry	1¼
2	19	8:45AM	16¾	16¼			14⅞	Dry	1⅞
				February 13, 1921					
1	19	7:15AM	17⅛	16½			16⅛	Dry	1
2	19	9:15AM	17⅝	16⅞			15⅛	Dry	2½
				February 14, 1921					
1	19	7:30AM	16⅝	16⅛			16	Dry	1⅝
2	19	8:25AM	17	16			15	Dry	2

Total shrinkage on 26 loaves..... 46.8 oz.
Average shrinkage per loaf..... 1.8 oz.

POINTS AND AUTHORITIES.

I.

Equity will not interfere with the enforcement of criminal statutes.

14 R. C. L. 367, 426, 427, 432.
4 R. C. L. 427, 428.

II.

Answering the first assignment of error which is that the court erred in not holding the law unconstitutional.

The law in question does not violate the provisions of the Constitution of the United States nor of Nebraska.

11 R. C. L. 1095, 1115, 1116.
Schmidinger v. *Chicago*, 226 U. S. 578.
Chicago v. *Schmidinger*, 243 Ill. 167.
People v. *Wagner*, 86 Mich. 594, 49 N. W. 609.
State v. *Normand*, 76 N. H. 541, 85 Atl. 899.
State v. *Layton*, 160 Mo. 474, 61 S. W. 171.
2 C. J. 958, 967, 992.
12 C. J. 909, 910, 931, 1064, 1122, 1141, 1142.
State v. *Drayton*, 82 Neb. 254, 117 N. W. 768.
Lincoln Street Ry. Co. v. *Lincoln*, 61 Neb. 109, 84 N. W. 802.
Halter v. *State*, 74 Neb. 757, 105 N. W. 298, 205 U. S. 34.
Enos v. *Huff*, 98 Neb. 245, 145 N. W. 244.
Chicago, etc. Ry. Co. v. *State*, 47 Neb. 549, 66 N. W. 624.
Merrill v *State* 65 Neb. 1, c. 517.
11 R. C. L. 1098.
25 R. C. L. 837, 842.
12 C. J. 931, 958, 967, 1214, 1215.
6 R. C. L. 201, 202.

III.

The second and fourth assignments of error is that the court erred in refusing to hold that said law deprived plaintiffs of

liberty and property without due process of law and impaired the obligation of contracts.

Plaintiffs in error have no rights of property preventing the exercise of the police power.

See cases cited under II hereof.

IV.

The passage of the Bread Law was a proper exercise of the police power.

11 R. C. L. 1116.
12 C. J. 920, 908, 909.
Schmidinger v. *Chicago*, 226 U. S. 578.
Mobile v. *Yuille*, 3 Ala. 137, 36 Am. Dec. 441.
Chicago v. *Schmidinger*, 243 Ill. 167, 90 N. E. 369.
People v. *Wagner*, 86 Mich. 594, 49 N. W. 609.
Commonwealth v. *McArthur*, 152 Mass. 522.
People v. *Brazee*, 183 Mich. 259, 149 N. W. 1053.
State v. *Drayton*, 82 Neb. 254, 117 N. W. 768.

V.

The third and fifth errors assigned are that the court erred in failing to hold that said law denied to plaintiffs equal protection of the laws and abridged the privileges and immunities of citizens.

The law is uniform in operation within the state.

12 C. J. 932, 1141, 1142, 1158.
12 R. C. L. 1097.

VI.

The necessity for the law is exclusively a legislative question.

12 C. J. 891, 892, 893, 894, 922.
State v. *Morehead*, 99 Neb. 527.
Schultz v. *State*, 89 Neb. 34, 130 N. W. 972.
State v. *Collum*, 138 La. 395, 70 So. 338.
Halter v. *State*, 74 Neb. 757, 205 U. S. 34.

11 R. C. L. 1096.
28 R. C. L. 3

VII.

The law is reasonable in its provisions and operation.

12 C. J. 892, 893.
Halter v. *State*, 74 Neb. 757, 205 U. S. 34.

ARGUMENT.

It is sought in this proceeding to prevent the operation of a statute enacted under the police power, violation of which carries a punishment by a fine not exceeding $100 and by imprisonment not exceeding ninety days, in the case of a second offense.

This action is a proceeding in equity for an injunction. It is sought to take the case out of the general rule that equity will not interfere with the enforcement of a criminal statute by an attempted showing that property rights are involved. We do not believe that under the modern rulings of the courts, that the mere possibility that property rights of an individual may be affected, is sufficient to restrain the operation of a criminal statute.

> "It is the general rule that equity will not interfere with the police in the enforcement of criminal statutes, nor extend its help for the purpose of aiding one to commit a crime, and hence it will refuse an injunction when the evident purpose thereof is to prevent police interference in the conduct of any unlawful business, it being held that, if the plaintiff has been oppressed and injured by any unlawful acts on the part of the public authorities, he must seek redress either under the provisions of the penal law, if any remedy is thus afforded, or by an action at law for damages."
>
> 14 R. C. L. 367.

"The general rule is that a court of equity has no jurisdiction or power to interfere to arrest authorities charged with the execution of the criminal law, whether

it pertains to the state at large or to the municipalities which are agencies in the administration of civil government. This interference has been held so completely beyond the jurisdiction of courts of chancery that their decrees in such cases have been disregarded as absolutely void in collateral proceedings and persons arrested for contempt for violating their injunctions discharged on habeas corpus."

14 R. C. L. 426, 427.

"The principle applies even though the injunction is not asked against the prosecuting official, where, if granted, it will operate to enjoin criminal prosecutions. This rule, which also controls in proceedings brought in a federal court to enjoin criminal proceedings in a state court under a local enactment, is a wise one and is founded on sound principles of public policy, having regard to the fact that the prosecution and punishment of crimes and misdemeanors are matters peculiarly within the province of common law courts, and that for a court of equity to assume jurisdiction in such cases would invade the domain of the latter tribunals. Nor is it material whether the prosecution is by indictment or summary process, as in all such cases the remedy by injunction is regarded as inappropriate. It is also apparent that, in most of these cases, the facts on which a complainant would base his claim for injunctive relief, as for instance the illegality of an ordinance, could be asserted by way of defense in the criminal prosecution. In this connection it is also held, although there is authority to the contrary, that the equitable doctrine of multiplicity of suits is not applicable in such a case."

4 R. C. L. 427, 428.

It would therefore seem that in a suit to enjoin the operation of a criminal statute the courts would be inclined to refuse relief in equity for the reason that the illegality of the law could be asserted by way of defense in a criminal prosecution and thus there is an adequate remedy at law.

"In line with the recognized principle that the jurisdiction of such a court is to protect property, there is much authority for the doctrine that it will interfere

by injunction to stay any proceedings, whether connected with crime or not, which injuriously affect property."
4 R. C. L. 428.

In the instant case, however, it is noteworthy that no criminal prosecution had been instituted and that even before the law was in operation it was attacked. This is true even though the bakers have never made any bona fide effort to comply with the law. The record shows without dispute that such attempts as they made to determine the amount of evaporation from certain loaves of bread were not made in an attempt to bake bread within the provisions of the bread law.

"In some cases, however, it is held that the invalidity must be established before equity will interfere to restrain a prosecution under the enactment, it being asserted that a court of equity will not, under such circumstances, inquire into the constitutionality of a legislative act on the ground of the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened. The theory on which these cases proceed is that if the law should be held valid the courts cannot punish the complainant for the offenses committed, or compensate those injured by his wrongful action while the hands of the officers of the law are stayed by injunction, and it is said that the exercise of the jurisdiction contended for would greatly confuse and embarrass the enforcement of the police power, and, on sound principles of public policy, ought not to be favored. In line with this view it has been held that equity has no jurisdiction to enjoin threatened criminal proceedings under a statute enacted under the police power, although it be charged that the statute is invalid, and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the defense thereto in a court having jurisdiction of the offense is adequate and unembarrassed."
14 R. C. L. 432.

II.

The law in question does not violate the Constitution of the United States nor of Nebraska.

The authorities hereinafter cited apply to certain allegations made that the bread law is unconstitutional. Scrutiny of the various decisions reveal without further comment the application of the respective authorities to the respective questions of constitutional law.

> "The mere fact that a law restrains the liberty of citizens of the state, or the liberty of citizens of the United States, does not render it unconstitutional."
>
> 12 C. J. 909, 910, 931.
>
> *Halter* v. *State*, 74 Neb. 757, 105 N. W. 298, 205 U. S. 34.
>
> *Enos* v. *Hanff*, 98 Neb. 245, 145 N. W. 244.
>
> *Chicago, etc. Ry. Co.* v. *State*, 47 Neb. 549, 66 N. W. 624.

> "Statutes and ordinances enacted within the scope of the police power for the taxation and regulation of professions, trades and business, do not constitute an infringement of vested rights."
>
> 2 C. J. 958, 967.

It is apparent in the instant case that the law is a regulatory law and it does not in any manner confiscate the property or business of the bakers nor prohibit them from continuing their occupation.

> "All contracts, whether made by the state itself, by municipal corporations or by individuals, are subject to be interferred with, or otherwise affected by subsequent statutes enacted in the bona fide exercise of the police power and do not by reason of the contract's clause of the constitution enjoy any immunity from such legislation."
>
> 2 C. J. 992.
>
> *Lincoln Str. Ry. Co.* v. *Lincoln*, 61 Neb. 109, 84 N. W. 802.

"A statute enacted within the scope of the police or reserved powers of the state is valid notwithstanding any effect it may have on previous contracts made by corporations with third persons."

12 C. J. 1064.

"Neither the guaranty contained in the original constitution of the privileges and immunities of citizens of the several states, nor that contained in the fourteenth amendment of the privileges and immunities of citizens of the United States, in any wise takes away or impairs the police power of the several states to pass laws for the promotion of the health, morals, safety and general welfare of persons subject to their jurisdiction."

12 C. J. 1122.

State v. *Drayton*, 82 Neb. 254, 117 N. W. 768.

It is claimed that the bread law makes no provision for the punishment of nonresidents of the state, and for that reason it is not uniform. It is not required, however, by law that the law be uniform except as operating within the jurisdiction of the state.

"The fourteenth amendment, however, provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The phrase 'within its jurisdiction' as used in the fourteenth amendment has been interpreted as limiting the guaranty of the equal protection of the laws to the persons who are physically within the territorial jurisdiction of the state and the protection of the laws they invoke."

12 C. J. 1141, 1142.

It has been definitely decided that the regulation of the manufacture and sale of food articles is a proper subject of legislation.

"That the legislature has power to regulate the manufacture and sale of articles of food, even though the right so to manufacture and sell be called a natural right, is so well established as to hardly require the citation of authorities."

11 R. C. L. 1095, 1115, 1160.

This authority has been expressly held to apply in the matter of the manufacture and sale of bread.

11 R. C. L. 1115, 1116.
Schmidinger v. *Chicago*, 226 U. S. 578.
Chicago v. *Schmidinger*, 243 Ill. 167.
People v. *Wagner*, 86 Mich. 594, 40 N. W. 609.
State v. *Normand*, 76 N. H. 541, 85 Atl. 899.
State v. *Layton*, 160 Mo. 474, 61 S. E. 171.

It is contended that the bread law is invalid because it was not properly enacted in accordance with the provisions of Section 14, Art. III of the Constitution of Nebraska, which provides that no bill shall contain more than one subject and that the same shall be clearly expressed in the title. The title to the bread law is as follows:

> "An Act establishing a standard weight loaf of bread for the State of Nebraska, and providing a penalty.
>
> "Be It Enacted by the People of the State of Nebraska:"

Section 1 of the act makes it the duty of the department of agriculture to enforce the law; make necessary examinations, rules and regulations.

Section 2 establishes the standard weight and, provides that the loaves shall be made of pure flour and wholesome ingredients.

Section 3 provides for a tolerance of two ounces per pound in excess of standard weights by an average of twenty-five loaves of any one unit. In the case of residents of the state the weights are to be taken on the premises where the bread is baked and to apply for a period of twenty-four hours after baking. Bread shipped in is to be weighed where exposed for sale.

Section 2, in referring to the quality of a loaf of bread, requires it to be pure and wholesome. This is germane to a standard loaf. The only matter contained in the act which may be objected to as not in the title is Section 1,

relating to the enforcement of the act. But, inasmuch as the title recites that the act is to provide a penalty for violation, it would seem germane with this part of the act and the title to hold that the first section is germane to the subject and within the title.

An act may properly contain the provisions for carrying it into effect without being open to the objection that the bill contains more than one subject.

Merrill v. *State*, 65 Neb. 1, c. 517.
11 R. C. L. 1098.
25 R. C. L. 837, 842.

III.

Plaintiffs in error have no rights of property preventing the exercise of the police power.

In this connection all of the cases cited under II of Points and Authorities, have application.

The question is raised whether or not the law deprives the bakers of their vested property rights without compensation.

"Since the very foundation of the police power is the control of private interests for the public welfare, the statute or ordinance is not rendered unconstitutional by the mere fact that private rights of person or property are subjected to restraint or that loss will result to individuals from its enforcement."

12 C. J. 931, 958, 967.
6 R. C. L. 201, 202.
Enos v. *Hanff*, 95 Neb. 184, 145 N. W. 240.
Chicago, etc. Ry. Co. v. *State*, 47 Neb. 549, 66 N. W. 624.

"A statute enacted within the scope of the police or reserve powers of the state is valid notwithstanding any effect it may have on previous contracts made by corporations with third persons."

12 C. J. 1064.

> "A statute otherwise valid is not rendered void merely because it limits or restricts the use which the owner may make of his property or because it diminishes the value of such property or indirectly works harm and loss to individuals."
>
> 12 C. J. 1214, 1215.

The law cannot be held unreasonable because it limits the size of the loaves to specified weights or because it does not permit loaves of other weights to be made for sale by special contract.

Chicago v. *Schmidinger*, 226 U. S. 578.

Under the authorities cited it therefore appears that the mere fact that there may be expense in connection with change of appliances and equipment of the bakeries does not constitute a taking of vested property rights without compensation in violation of law. The right to operate any business is always dependent upon the general welfare of the people and the operation of the police power. The legislature has determined that the law is necessary on account of the frauds being perpetrated upon the purchasing public and in order that the public may be advised of the merchandise which they receive for the purchase price.

This being true it appears that any of the property of the bakers which can be used only for the baking of bread which is in fraud of the public would have been used in the perpetration of a fraud upon the public in the production of short weight loaves.

It is of course contended by the bakers that they fluctuated the size of the loaves to meet the cost of the ingredients. The legislature, however, has said with good reasoning that it is just as easy for the bakers to give a standard weight loaf and to fluctuate the price instead of the weight of the loaves. We refrain from quoting at length from the authorities, but the cases cited in this brief hold beyond question that there is no violation of the constitutions by

ny of the provisions of this law, so far as it pertains to he fixing of a minimum weight for a loaf of bread.

There is left for consideration only the question of whether he fixing of a maximum weight of a loaf of bread in this aw will in any manner change the application of the law s laid down in these authorities. This proposition is here- nafter considered.

IV.

The passage of the Bread Law was a proper exercise of the olice power.

In another part of this brief we will consider the maximum eight provision of the bread law. Whether or not the law valid with the maximum weight provision therein as a uestion which much be decided by considering whether r not the law is reasonable in its provisions. This particu- ar proposition, however, is not necessarily involved in the uestion of whether or not the enactment of the bread aw is within the police power, disregarding for the time ie question of the reasonableness of the law.

It has been decided that the manufacture of bread and ie regulation of its sale is a subject for the exercise of the olice power.

11 R. C. L. 1116, and citations.

Considering the minimum weight provision in the law, has been decided that laws prescribing standard size loaves f bread and prohibiting with minor exceptions the sale of ther sizes, should be sustained.

12 C. J. 920.

Schmidinger v. *Chicago*, 226 U. S. 578.

Mobile v. *Yuille*, 3 Ala. 137, 36 Am. Dec. 441.

Chicago v. *Schmidinger*, 243 Ill. 167, 90 N. E. 369.

People v. *Wagner*, 86 Mich. 594, 49 N. W. 609.

Commonwealth v. *McArthur*, 152 Mass. 522.

V.

The law is uniform in operation within the state.

The law operates alike as to all persons within the state, with the exception that bread shipped into Nebraska from other states is to be weighed where sold. This merely recognizes the necessity of obtaining information as to the weight of the loaves of bread offered for sale which are baked by nonresident bakers. It is for the protection of the resident bakers of Nebraska, and constitutes merely a part of the procedure for the enforcement of the law. There is no discrimination as to weight or standards of the loaves sold. It is therefore apparent that the law acts uniformly within the state of Nebraska.

In any event the prosecution or conviction of nonresident bakers who may violate this law raises no judicial question for the court, but is a matter which pertains to the executive duties of the officers vested with the enforcement of the law.

The law operates uniformly within the jurisdiction of the state of Nebraska, and the point of constitutional law raised by the bakers has no application.

> "The Fourteenth Amendment, however, provides that no state shall deny to any person within its jurisdiction the equal protection of the law. The phrase 'within its jurisdiction' as used in the fourteenth amendment has been interpreted as limiting the guaranty of the equal protection of the laws to persons who are physically within the territorial jurisdiction of the state, the protection of whose laws they invoke."
>
> 12 C. J. 1141, 1142.

> "Such statutes are valid as long as they apply equally and uniformly to all persons similarly situated."
>
> 12 C. J. 1158.

> "No constitutional obligation rests on the legislature to subject every article of food to the same regulation."
>
> 12 R. C. L. 1097.

The bread law operates uniformly as to all persons within the boundaries of the state of Nebraska, and the same penalty may be inflicted upon any person selling bread in the state of Nebraska not conforming to the law. Courts have held that not every article of food shall be required to conform to the same provisions of law, thus recognizing that in circumstances pertaining to manufacture and sale, food products should receive individual attention by the legislature.

VI.

Necessity for the law is exclusively a legislative question.

That the question of the necessity for any law is exclusively a question for the legislature has been so well determined by the courts it hardly seems necessary to comment upon this point.

The legislature has decided that there is a probability of fraud in connection with sales of bread of the former weights, and has fixed a tolerance of two ounces per pound. This tolerance should be a safeguard against sales of short weight loaves as pretended larger loaves, and particularly the sale of three-quarter pound loaves marketed for one pound loaves. It appears that this matter was thoroughly presented to the legislature before the law was enacted (Trans. 35).

> "It is a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives of the legislature nor of the members thereof."
>
> 12 C. J. 891, and cases cited.
>
> *State* v. *Morehead*, 99 Neb. 527.

> "What constitutes a proper subject for regulation under the police power is a judicial question; all acts, however, relating to the policy, wisdom or expediency of sale regulations under the police power are wholly for legislative determination."
>
> 12 C. J. 982.
>
> *Schultz* v. *State*, 89 Neb. 34, 130 N. W. 972.

"In passing on the validity of statutes, purporting to have been enacted under the police power, the courts must disregard all acts that relate to the wisdom or policy of the act and may declare the act void when it clearly appears that it bears no real or substantial relation to the police power, or the means adopted or affecting the object are manifestly arbitrary and unreasonable; they cannot review the economics or facts on which the legislature bases its conclusions that an existing evil should be remedied by an exercise of the police power."

12 C. J. 893.

"Whether in any given case the general welfare calls for particular legislation is a question primarily for the legislature; and the courts can undertake to override the legislative decision only where, after every allowance is made, no sufficient basis for it can be found."

12 C. J. 894.

State v. *Collum*, 138 La. 395, 70 So. 338.

"A business or occupation is not exempt from regulation by the mere fact that it is lawful or that its exercise or conduct does not constitute a nuisance per se. It is within the province of the police power to regulate all professions, trades, occupations and business enterprises that are of a quasi public nature or that may, if exercised or conducted without restriction, prove injurious to the public heath, safety or morals or to the general welfare."

12 C. J. 922.

Halter v. *State*, 74 Neb. 757, 205 U. S. 34.

"Whether in a given instance the manufacture and sale of an article intended for human consumption is deleterious to health, and whether the public welfare demands that such business be prohibited are properly questions of fact and policy exclusively for the determination of the legislature."

11 R. C. L. 1096.

"The general object or purpose of acts for the regulation or standardization of weights and measures is the prevention of fraud and to provide a method by which the purchasers of commodities may protect them-

selves from short weights and measures and be enabled to obtain quantity of property bought and paid for, which has always been recognized as a proper subject for the exercise of the police power."

28 R. C. L. 3.

The enactment of the bread law is clearly within the jurisdiction of the police power of the state and the legislature has declared that the enactment of the law was a public necessity.

VII.

The law is reasonable in its provisions and operation.

The bakers contend that the bread law cannot be complied with and for that reason it is unreasonable and not a proper exercise of the police power.

All of the various objections raised by the bakers have been settled in adjudicated cases, unless it be determined that the inclusion of the maximum weight provision in the Nebraska bread law has rendered these decisions inapplicable to the Nebraska bread law. There is but one new question before the court in this matter. That is whether or not this law is reasonable.

The greater portion of the evidence offered by the bakers pertains to the business of manufacturing bread. Difficulties involved in the manufacture of bread are discussed at great length. The trial court was informed that the bread law was unconstitutional for the reasons which have been heretofore considered in this brief and which, for the convenience of the court, are enumerated as follows:

1. That it violates the Fourteenth Amendment of the Constitution of the United States.

2. That it interferes with the right to contract.

3. That it violates Section 3, Article I, Constitution of Nebraska, pertaining to deprivation of life, liberty or prop-

erty without due process of law; Section 1 of the Bill of Rights pertaining to "rights," Section 24 of the Bill of Rights prohibiting discrimination between citizens in respect to property rights; and Section 14, Art. 3, pertaining to the form and subjects of bills.

4. Deprives the bakers of vested property rights.

5. There cannot be uniform enforcement.

6. The public is not harmed by the present method of conducting the bread business.

7. The public does not demand the law.

8. Food values remain the same irrespective of weight.

9. The public in fact will suffer.

10. Bread will be poorer in quality.

11. The bakers before the passage of the law were able to fluctuate both the price and the size of the loaf for the benefit of the public.

12. Split-cent proposition, i. e. that the bakers on account of the cost of flour cannot graduate the selling price to meet the cost price because that can be done only by fluctuating the size of the loaf.

13. Because of the foregoing the bakers will make an unconscionable profit to the public detriment.

14. The passage of the bread law was not within the police power of the state.

15. The law is unreasonable.

16. Customers demand various kinds of bread.

17. Difficulties in the baking because of:

(a) Numerous and varied ingredients.

(b) Humidity, temperature, etc.

(c) Difficulty in obtaining uniform heat in oven.

(d) Evaporation in baking not uniform.

(e) Loss by evaporation after baking.

(f) Fermentation is not uniform.

(g) Dough cannot be scaled accurately.

(h) Loss in the scaling of the dough.

It is apparent that, in considering this law and the right to enact it under the police power, many of the points made by the bakers are immaterial. Most of these propositions, however, have been considered and disposed of in the authorities cited in this brief, so far as applicable to bread laws with a minimum weight provision.

The case of *Schmidinger* v. *Chicago*, 226 U. S. 578, disposed of many of these questions. In that case it was held:

> "The right of the legislature, or the municipality under legislative authority, to regulate one trade and not another is well settled as not denying equal protection of the laws.
>
> "The right of the legislature, or the municipality acting under state authority, to regulate trades and callings in the exercise of the police power without federal interference under the due process clause of the Fourteenth Amendment is also well settled.
>
> "The making and selling of bread, particularly in large cities, is obviously a trade subject to police regulation.
>
> "Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regulation, and the courts can only

interfere when such regulation arbitrarily exceeds a reasonable exercise of authority.

"The fact that laws prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes have been sustained by the courts of several states, shows the necessity for police regulation of the subject.

"Mere inconvenience to merchants conducting a business subject to police regulation does not violate the exercise of the power.

"There is no absolute liberty of contract, and limitations thereon by police regulations of the state are frequently necessary in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment.

"The ordinance of Chicago of 1908 enacted under legislative authority, fixing the standard sizes of bread loaves and prohibiting the sale of other sizes, is not unconstitutional as depriving those dealing therein of their property without due process of law or as denying them equal protection of the law or as interfering with their liberty of contract."

In the case last cited the bakers raised many of the questions which are raised in the case at bar.

1. Prohibition of the making of loaf bread in weights such as were in large demand at the time of the passage of the ordinance in question in the ordinary course of business without fraud, unreasonably, arbitrarily and unnecessarily interfere with the legitimate pursuit of an ordinary, private and useful business and with the right of contract in relation thereto. It thus deprives the plaintiff in error of liberty and property without due process of law.

2. The ordinance, however, improperly prohibits the making of contracts by the baker with his customer for large quantities of loaf bread, not for resale in the loaf but for restaurant and hotel use, in weights other than those fixed in the ordinance.

3. That the weight of the bread in the loaf varies and is adjusted in accordance with the fluctuations in the price of raw material, labor and other elements of expense of production and the different qualities of bread and as a result of competition.

4. Demand in Chicago, especially in the restaurant trade, for bread in weights differing from those fixed by the ordinance.

5. The moisture in the bread after it leaves the oven causes very appreciable shrinkage in weight, the extent of which depends upon the quality and size of the loaf, the atmospheric conditions and the dryness and temperature of the place where kept.

6. It appears that in order to insure bread of the standard weight of sixteen ounces it is necessary to scale the dough before baking at about twenty ounces. This meant allowing for all contingencies.

In the case of *People* v. *Wagner*, 86 Mich. 597, the questions of evaporation, fermentation and baking were considered. The court in that case said:

1. The ordinance is a valid exercise of the police power.

2. The law does not violate the fourteenth amendment as depriving bakers of property without due process of law.

3. It is not special legislation.

4. The ordinance is not unreasonable.

5. Fluctuation of ingredients of bread and consequent change in price does not render the ordinance unreasonable.

People v. *Wagner*, 86 Mich. (1 c.) 597:

"It was urged in this case that in order to get a pound of baked bread, the bakers are compelled to put into

> the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates they reply, 'water.' But they say the process of *baking is not always uniform;* that the oven may be too hot, in which case the bread dries up, rather than bakes, and in order to insure a pound loaf, the latter contingency must be provided against and the weight of the dough must always be regulated accordingly; that *fermentation* is not always regular, and when it reaches a certain point the dough must be put into the oven, without reference to the condition of the oven; that the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust."

Then there is raised the question of distributing an ordinary advance in price; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent.

The court on this last proposition said:

> "This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, a dozen buttons."

Upon the question of the necessity for the law the court said:

> "Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short weight loaves if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit."

The cases just considered settle practically every proposition and objection raised by appellants as to the difficulties encountered in the manufacture of bread to comply with the provisions of a minimum weight law.

Maximum Weight Provision.

There can remain but one contention or objection upon the part of appellants which may require the attention of the court.

Appellants contend that by fixing the maximum weight of a pound loaf at 18 ounces and other loaves with a tolerance of two ounces per pound, the legislature has acted unnecessarily, unreasonably and unlawfully.

The necessity for the law has been heretofore considered as a question for the legislature. It can readily be seen that a loaf weighing 20 ounces might by unscrupulous bakers or retailers be sold as a one and one-half pound loaf. Hence the maximum provision is intended to and will prevent fraud because of short weights which might be encountered upon purchasing the larger sized loaves. The same reason exists for not permitting a three-quarter pound loaf which could be sold as a short weight pound loaf.

That the legislature has the right to deal with the question involved herein, under proper exercise of the police power there can be no doubt.

Believing that appellants are foreclosed as to every proposition except one, we will consider that one remaining question. Is the maximum weight provision of the Smith bread bill a reasonable exercise of the police power?

The purpose for it is clear and sufficient. It intends to and will prevent fraud.

Can it be complied with by the bakers?

Tests taken by certain bakers at the request of the state indicate that in the ordinary mode of baking these bakers baked bread within the law.

Their tests and those made by appellants are next considered as they have been considered by appellees as shown by recapitulation as follows, to-wit:

Exhibit 22 (Trans. 120) shows that bread can be baked within the tolerance of two ounces without any additional machinery for the purpose. Bread baked under this test was baked by the bakers in an attempt to comply with the law, and the test shows that the twenty-four loaves baked did comply with the law; that there was an average loss of only .48 oz. in each loaf in the twenty-four hours after baking.

In the test shown by Exhibit 26 (Trans. 121) the average loss in twenty-four hours was .32 oz. By Exhibit 9 (Trans. 122) the average loss in twenty-four hours was .4 oz. By Exhibit 13, (Trans. 123) it was shown that the average loss in twenty-four hours after baking was .2 oz. By Exhibit G, (Trans. 124) it is shown that the average loss in twenty-four hours after baking was .8 oz. By the tests shown at page 120 of the transcript, it is shown that the average loss is .3 oz. in twenty-four hours.

Certain tests were made by the bakers attacking this law.

For the information of the court we segregated from their tests and have considered certain loaves which were kept under like conditions after baking. The summary of these tests referred to at pages 26-28 of this brief indicate that the shrinkage of a loaf was 1.2 oz. within the twenty-four-hour period, where the loaves were kept under moist conditions; the loss was 1.43 oz. where the loaves were kept under medium or moderate conditions; and the loss was 1.8 oz. where the loaves were kept in a dry temperature.

It is thus seen by taking the average of the number of loaves, even of those loaves which were baked with no attempt to comply with the law, that the general average of the loaves kept under like conditions shows less evapora-

tion than provided for in the two ounce tolerance provided by law.

In thus considering whether or not the law can be complied with we have the positive testimony of several bakers that the law can be complied with, and have their tests to prove it.

Wm. H. Cluett, chief deputy inspector of weights and measures of the city of Chicago, testified that the two-ounce tolerance is a generous allowance.

To offset this positive evidence that the law can be complied with there is only the evidence of certain experts who made scientific tests to determine the amount of evaporation in a loaf of bread. None of these bakers or experts conducted their experiments with the premise that they would attempt to bake a loaf which would comply with the law. None of them attempted to do so. Their tests in nowise prove or indicate that the law cannot be complied with. Nearly every one of these experts and bakers testified that they could bake a product which would comply with the provisions of the bread law. Some of them stated that the product would not be good bread and would not be marketable, but none of them produced such a product so that the court might determine whether or not it would be merchantable bread.

On the other hand, to sustain this law there was before the trial court not only evidence of certain bakers who baked bread which did comply with the law, but the product baked by them was in court and it was considered bread (Trans. —).

It is to be noted that the bread law does not make any requirements as to quality of bread other than it shall contain pure ingredients. The law contemplates that competition and the American housewife will take care of the question of quality. The law is concerned with weights only. The evidence in this case shows that bread can be baked without hardship within the two ounce tolerance provided

by the law. Certain other contentions are made which it is claimed make the law unreasonable in its application.

It is claimed by Mr. Burns, one of the appellants, that the small bakery could comply with the law because it disposes of its products within about three hours (Trans.). He claims that the larger bakery, on account of having to hold the bread for twenty-one hours longer, would have to scale in the dough one ounce more than the small bakery. In other words, he claims that there would be an ounce of evaporation after the first three hours of the twenty-four hour period, or one ounce evaporation during twenty-one hours. This does not seem to be in accord with the weight of the testimony to the effect that the greatest evaporation occurs during the first three to six hours. None of the tests would indicate that the bread would evaporate one ounce per pound during the first three hours. And in fact, tests made under ordinary conditions show that the loss is less than two ounces per pound during the entire twenty-four hour period. This indicates that if only one ounce is lost in 21 hours that the two ounce tolerance for the 24 hours is a generous allowance.

This seems fair when it is considered that the law does not contemplate that each individual loaf should weigh not more than 18 ounces when baked nor less than 16 ounces after 24 hours. But the law does contemplate that there should be an average of 25 or more loaves, say, for instance, 25 pound loaves, allowing a two-ounce tolerance per pound, should not weigh when baked and at the end of the 24-hour period to exceed 28 pounds and two ounces nor less than 25 pounds. Of course, some of the individual loaves under the law could weigh more than 18 ounces and some might weigh less than 16 ounces, but on the average the weight should conform to the law as above set forth.

It is to be noted that the tests made by Mr. Haas were not made in conformity to the actual atmospheric conditions

as they existed. It is to be noticed that in his tests the first eight loaves kept at a temperature of 76 degrees and a relative humidity of 55 per cent evaporated less than 1½ ounces. The next four loaves were kept in a temperature of 92 degrees and a humidity of 28 per cent; and the next two loaves at a temperature of 96 degrees and a humidity of 18 per cent. The witness, when asked why he kept the loaves in such a low humidity and such high temperature, replied that he understood those figures represented weather conditions in Nebraska. The weather reports attached to the bill of exceptions indicate that the witness secured his humidity of 18 per cent under date of September 30, 1921, which was the lowest humidity running from 51 per cent in the morning to 18 per cent at noon and 28 per cent in the evening, indicating a relative humidity of 32 per cent.

It is to be noted also that the temperature on this date was but 61 degrees instead of 96 degrees. These circumstances indicate that the tests were unfair and were made under artificial conditions. It appears that when the humidity is low the temperature is correspondingly low in percentage and degrees respectively. Inspection of his tests shows that loaves baked and kept under wide ranges of temperature and humidity evaporated less than two ounces during the 24-hour period and are easily within the provisions of the law. In order to get loaves without the law he was compelled to select imaginary conditions which did not conform to true conditions as to temperature and humidity.

About the same thing may be said about the tests made by Mr. Peterson as the charts made by him indicate that the bread was kept under higher temperature than was the actual temperature of that date, thus indicating that the tests were made under imaginary and artificial conditions rather than conditions as they actually existed.

We heretofore have referred to some advertisements wherein appellants advertised that they would bake bread of

a certain weight. In connection therewith they advertised as follows:

> "We actually manufacture our own weather at our bakery. On clear days when the air is fresh the dough raises fine, but on a damp, heavy day, the dough refuses to act just right and the bread is not up to quality. With the aid of the wonderful apparatus shown above we have absolute control over weather conditions in all parts of our wonderful bakery no matter whether the sun is shining or the rain is pouring down, no matter whether the sultry breezs of summer or the icy blasts of winter constitute the weather out of doors, inside the dough room at the Burns Bakery the air will always be just the right temperature, Pure, Sweet and Wholesome" (Trans 127).

It seems that during the period of the war the production of bread was regulated and the bakers met all the conditions (Jay Burns, Trans. 31).

The bakers advertised that they would increase the size of their loaves and would sell to the public a loaf of a specific weight. The advertisement says nothing about the dough but refers to bread (Trans. 36).

MR. HARLEY MERTZ AND MR. JOHN LETT, two bakers of long experience, say that the law can be complied with and that a tolerance of two ounces is sufficient (Trans. 65-66).

It seems to be generally admitted that the bakers can produce a "product" which would come within the provisions of the law. The appellants and their experts say it would not be commercial bread of salable quality. Yet, they produced none for the information of the court. They made no attempt to do so. Have appellants shown that the law is unreasonable and cannot be obeyed? We think not.

The only "product" produced at the trial which came within the provisions of the law was the bread baked by

appellees' request. This bread not only was within the provisions of the law, but was apparently equal in appearance and quality to the bread produced by appellants and designated by them as "quality bread." At least the court and appellees' attorneys could distinguish no difference in favor of the "quality bread" (Trans 53).

Examination of the record indicates there is reason to believe that the bakers are opposing this law for the reason that it will restrict their operations and profits received in fluctuating both the size of the loaf and the price.

The legislature has said there is need for the law. We believe there is need for the law. We believe the evidence shows that the law is reasonable. Plaintiffs in error failed to show unreasonableness or impossibility of compliance. They have made no attempt to bake bread within the specifications of the law. The presumption of constitutionality has not been rebutted. Defendants have adduced evidence showing that good bread can be produced under the restrictions provided.

The bakers comment upon the fact that their witnesses who testified to certain tests made by them were experts (Trans. 60, 61). They comment upon the fact that the bakers who testified for the defendants in error were not experts or scientists (Trans. 63). The fact that the bakers who baked bread which came within the provisions of the bread law were not experts seems to us to be very good evidence that the fact that any baker making an attempt to come within the provisions of the law may bake bread within the provisions of the bread law. All of the so-called experts and scientists failed to make an attempt to comply with the law. Their so-called scientific experiments, under the circumstances, seem valueless to us because there was no attempt to bake bread within the provisions of the law. They say that bread baked within the provisions of the law would not be a salable product, yet they failed to produce

a single loaf baked by them within the provisions of the law. On the other hand bread was produced by the defendants in error which had been baked by non-experts which did comply with the law. This was good bread.

Plaintiffs in error state that they have no quarrel with the minimum feature of the law, but do most earnestly contend that the maximum feature is a violation of their constitutional rights and privileges (Brief, p. 23). This amounts to an admission that the only question involved in this case is the reasonableness of the Nebraska bread law, containing the maximum weight provision. They admit that bread laws with the minimum provision have been sustained because they were within the police power as tending to protect the public against a short weight loaf. This is an admission that this is a subject for the police power. Indeed there can be no question about it. The legislature has determined that the minimum provision alone does not protect the public and that a maximum provision is needed. The determination of this necessity by the legislature forecloses any inquiry into the necessity for the law. This leaves for the determination of the court the question of the reasonableness of the law.

Plaintiffs in error have introduced much evidence concerning and have commented at length in their brief upon the subject of the scientific baking of bread. These facts are very instructive and educational, but in our opinion fall far short of the mark in an attempt to prove the law unreasonable. If, after frequent attempts to bake bread which complies with the provisions of the law, they had failed, such evidence would have some bearing. They failed to make one attempt to comply with the law. The evidence shows that bread may easily be baked within the two ounce tolerance provided by the law.

The legislature has concluded that for public benefit and to prevent imposition upon the purchaser, a standard loaf

should be established. It has concluded that it is for the public benefit that the bakers fluctuate the price of the loaf rather than its weight.

Under the authority cited in this brief we conclude, and we believe that this court will conclude, that the Nebraska bread law represents a reasonable application of the police power. We believe that the judgment of the state courts of the State of Nebraska should be affirmed.

Respectfully submitted,

O. S. SPILLMAN, Attorney General State of Nebraska,
Attorney for Defendant in Error.

LLOYD DORT, Assistant Attorney General,
Of Counsel.

Dated, Lincoln, Nebraska, October 2, 1923.

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IN THE

Supreme Court of the United States

October Term, 1923

No. 94

JAY BURNS BAKING COMPANY, AND OTHERS,
Plaintiffs in Error,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND OTHERS,
Defendants in Error.

ON ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFFS IN ERROR

This Action Is Not One to Restrain Enforcement of a Criminal Statute.

Defendants in Error now claim that the Plaintiffs in Error should be denied the relief prayed for, because a Court of Equity will not enjoin the enforcement of a criminal statute. (Brief of Defendants in Error, 29, 31.) The claim is in effect an attack upon the jurisdiction of the Court, and that jurisdiction has not heretofore been questioned by the Defendants in Error, either in their answer, in the evidence, or in the arguments.

Such question is now raised for the first time. It was not pleaded as a defense in the answer filed by Defendants in Error, which answer, after admitting certain allegations made in the Bill, set forth:

VI. That plaintiffs "have a full and adequate remedy at law."

VII. That in the State of Nebraska all the Supreme Court Judges must hear and determine suits involving the constitutionality of a law, and that five judges must concur to hold the law unconstitutional.

VIII. A general denial (T. 16-17).

The claim now made for the first time consists of an affirmative defense, and should have been pleaded in the District Court of Lancaster County, Nebraska, where this action originated; and not having been so pleaded will not be considered in the Appellate Court.

> "The Supreme Court will not consider on appeal issues not tendered by the pleadings."
>
> Mauzy v. Hinrichs, 89 Neb. 280, 131 N. W. 218.
>
> Nielsen v. Central Nebraska, 87 Neb. 518, 127 N. W. 897.
>
> Rodriguez v. Vivoni, 201 U. S. 371, 50 L. Ed. 792.

But even on the merits the claim is not well founded.

This is not an action to restrain criminal prosecutons. It is an action to prohibit the invasion of personal rights and the rights of property, and to restrain the enforcement of an unconstitutional law.

Davis v. Los Angeles, 189 U. S. 207.

The Plaintiffs in Error challenge the right of Defendants in Error to do certain acts, which, if done, would invade property and personal rights and cause irreparable damage, so a Court of Equity may interfere.

Philadelphia v. Stimson, 223 U. S. 605.

"It is also settled that while a Court of Equity generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or dismeanors' (In re Sawyer, 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safe-guarding of rights of property."

Truax v. Raich, 239 U. S. 33, 37.

"It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

Dobbins v. Los Angeles, 195 U. S. 223.

"A Bill for an injunction to restrain the enforcement of a criminal or penal statute is allowable when the Statute is unconstitutional or invalid, where, in an attempt to enforce it, property rights are invaded, or where oft-repeated attempts to enforce it would create a multiplicity of suits, in themselves oppressive."

Shawnee v. Temple, 179 Fed. 517.
Royal Baking Powder Co. v. Emerson, 270 Fed. 429.
Greenwich v. Carroll, 125 Fed. 121.
Lamborn v. McAvoy, 265 Fed. 944.
Wiseman v. Lanner, 221 Fed. 695.

To the same effect—

Glover v. City of Atlanta, 148 Ga. 285, 96 S. E. 562.
Bear v. City of Cedar Rapids, 147 Ia. 341, 126 N. W. 324.
Brown v. Nichols, 93 Kan. 737, 145 Pac. 561.
Shuman v. Gilbert, 229 Mass. 225, 118 N. E. 254.

Allegations of Bill and the Facts

The Bill filed sets forth the facts and alleges that Plaintiffs in Error have no adequate remedy at law, and that by the enforcement of the unconstitutional Smith Bread Law, they will sustain immeasurable damage and irreparable injury.

The evidence shows that it is impossible for bakers to comply with the requirements of the Bread Law and continue to furnish the public with the quality of bread demanded and which is being furnished throughout the country; that the bakers by the enforcement of the law will sustain heavy material losses in property, and also irreparable injury to their business; that the expense of trying to comply with the law is prohibitive; that the present large investment in plants, equipment, machinery, etc., will be lost. (T. 24, 33, 34, 35, 51, 52.)

And in addition, the bakers and the dealers will be subjected to innumerable criminal prosecutions so long as they remain in business, so that both personal and property rights are invaded under the Smith Law, and Plaintiffs in Error and all others similarly situated will be remediless unless equity protects them in the prosecution of their lawful business as carried on today.

The Smith Bread Law, according to the evidence, makes it commercially impracticable for the bakers to carry on their lawful business of supplying the community with the quality of bread demanded by the buying public, no matter what the market prices of ingredients may be. Such law, therefore, has the effect to destroy such legitimate business which in many instances has been built up by extensive advertising, the purchase of costly machinery and equipment, the erection of expensive buildings and in other ways, at a very large expenditure of money, which expenditure will be lost to the bakers, with not only no corresponding gain to the people, but to the injury of the people, for they will not get what they have come to know and like as the standard quality of bread, but will get a substance which will be unpalatable and indigestible.

This Court has said that "to make it commercially impracticable to mine certain coal has very nearly the same

effect for constitutional purposes as appropriating or destroying it."

Pennsylvania Coal Co. v. Mahon, 260 U. S. ——, 67 L. Ed. 154, 156.

To destroy the production of the present-day excellent quality of bread is surely within the same principle of law. And in such destruction there is no reciprocal advantage to either the bakers or the consumers of bread to justify the law, as suggested in the foregoing decision in regard to a statute affecting the mining of coal.

The Opinion of the Supreme Court of Nebraska

The Supreme Court of Nebraska holds that the Bread Law is valid because it was within the Police Power of the State to make both a maximum and a minimum weight (T. 128). We have covered this phase of the matter in our original brief.

The opinion also suggests that bread may be wrapped and thus comply with the *maximum* as well as the *minimum* feature. But there is no law in Nebraska requiring bread to be wrapped and the evidence shows that while moisture will not evaporate from wrapped bread, yet that such bread, if wrapped before sufficient moisture has been evaporated, becomes soggy and unpalatable and consequently unsalable. After sufficient moisture has evaporated from a loaf so that the moisture remaining will not seriously affect the quality of the bread, then it may be wrapped with impunity but the evaporation which has already taken place may, under very common and prevalent conditions of heat and humidity, exceed the tolerance allowed, and thus an illegal loaf be produced. So that wrapping the bread does not protect either the baker or the dealer, but does or may have the effect of injuring the bakers' business and of giving to the consumer an inferior quality of bread without any compensating advantage to either of the parties.

That the Bread Law Is Capricious and Arbitrary

The only answer by Counsel for Defendants in Error to the assertion in our original brief that the Smith Bread Law is an arbitrary and capricious enactment, and that it has no relation to the health, safety, or morals of the people, is that "it can readily be seen that a loaf weighing 20 ounces might by unscrupulous bakers or retailers be sold as a 1½ pound loaf. Hence the maximum provision is intended to, and will prevent fraud because of short weights which might be encountered upon purchasing the larger sized loaves. The same reason exists for not permitting a ¾ pound loaf which could be sold as a short weight pound loaf" (Br. Defts. in Error, 49).

That is to say, the above is a frank admission for Defendants in Error that, in their *opinion*, there is a possibility under the existing order of things that a fraud may be perpetrated upon the public by "unscrupulous bakers." But just how or wherein the Smith Bread Law would prevent such "unscrupulous bakers" from deceiving the public is not shown.

Without the Smith Bread Law, if a customer asks and pays for a loaf weighing 24 ounces and only gets a loaf weighing 20 ounces, he is thereby defrauded and has his remedy, and the same is true of a 12 ounce loaf, or a loaf of any other weight. But just how the fixation of a maximum weight loaf "will prevent fraud," is not pointed out. If a purchaser asks for a half pound, a pound, and a 1½ pound loaf of bread, he must get at *least* those weights, or the baker and the dealer are subject under the general laws to prosecution. But if the purchaser be given loaves weighing respectively 10 ounces, 20 ounces and 30 ounces, wherein is he affected adversely as to his safety, his welfare, or his morals? Or wherein is he or can he be defrauded? That he gets *more* than he bargained for, is his gain, not his loss.

Under its police power a State may "prescribe regulations to promote the health, peace, morals, education and

good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Barbier v. Connolly, 113 U. S. 27, 31.
Lakeshore & M. S. Ry. Co. v. State of Ohio, 173 U. S. 285, 43 L. Ed. 702.

But the enactment of a measure for the ostensible purpose of preventing the perpetration of a fraud, is not within any of the enumerated or designated police powers; and in the nature of things it is impossible for any legislature to cover the specific contracts in which fraud may be practiced, and so that particular wrong is left to the general criminal laws of each commonwealth.

Prohibiting one legitimate business because it may be abused, and saying nothing about the thousands of other legitimate businesses which likewise may be abused, is certainly not giving all citizens the equal protection of the laws; and, moreover, the prohibition of doing that which may possibly in some way lead to fraud, has no more to do with the health, safety, welfare, or comfort of society, than has the prohibition of the use of the National flag as an advertising medium for commercial purposes; and *that* prohibition was held to be beyond the police power of a state.

Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41.

Nor than has a law prohibiting the sale of a railroad passenger ticket by other than an authorized agent holding a certificate of authority.

People v. Caldwell, 168 N. Y. 671, affirming 71 N. Y. S. 654.

Mere Possibility of Fraud Is No Justification for the Exercise of the Police Power.

There is nothing in the record of this case to justify the fear expressed by counsel for Defendants in Error that somehow and somewhere a fraud may be perpetrated upon

a long suffering public by unscrupulous bakers. It is not shown that under the law as it stands at the present time, the people have ever been defrauded or cheated in any way, shape, or manner, and the mere possibility that in the bread business a fraud may be perpetrated, affords no justification for the imposition of a maximum weight to a loaf of bread as well as a minimum weight to that loaf, when it is conclusively shown that in a given period of time there will be many days when, owing to the peculiar nature of bread, loaves cannot be made to comply with such law.

With reference to the ordinance prohibiting the maintenance of a private asylum for mild patients, the Supreme Court of California said:

> "Legislation of this character which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it."
>
> Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870.

And the principle holds good with reference to the fear that a private hospital might spread disease.

> San Diego v. City of East San Diego, 186 Cal. 252, 200 Pac. 393.

It is clear from the unanimous decisions of the Courts that what are reasonable regulations and what are subjects of police powers are judicial questions to be determined by the Courts; though the law-making bodies must necessarily be the judges of the necessity for such laws within proper limitations.

It is equally clear that such law-making bodies may not, under the pretense of exercising the police power, enact

laws not necessary to the preservation of the health, safety, welfare, or morals of the community; or laws that will be oppressive and burdensome upon the citizens engaged in lawful businesses.

If a Legislature prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, safety, or welfare of society, that is an unauthorized exercise of power, and it is the duty of the courts to declare such legislation void.

Toledo v. City of Jacksonville, 67 Ill. 37.

And when alleged police regulations are called in question, the test is whether they have some relation to the public health or public safety, and whether such is in fact the end sought to be attained.

California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 29.

So we submit that in fixing a maximum as well as a minimum weight for loaves of bread, the Legislature of Nebraska went beyond its powers, for such law not only is burdensome and oppressive upon the bakers and dealers, but is confiscatory of their property; and is also detrimental to the best interests of the people of the State of Nebraska with no corresponding advantage or compensation to them.

Respectfully submitted,

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Omaha, Nebraska, October 6, 1923.

It is so ordered.

JAY BURNS BAKING COMPANY ET AL. *v.* BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 94. Argued October 19, 1923.—Decided April 14, 1924.

1. The power of a State to protect the public from imposition by sale of short-weight loaves of bread cannot be exerted in such a way as arbitrarily to prohibit or interfere with, or impose unrea-

sonable and unnecessary restrictions upon, the business of making and selling it. P. 513.

2. It is the duty of the court to determine whether a regulation challenged under the Constitution has a reasonable relation to, and a real tendency to accomplish, the purpose for which it was enacted. *Id.*

3. A statute of Nebraska prescribes the minimum weights of loaves of bread to be made, or offered, for sale in the State, and, in order to prevent the palming off of smaller for larger sizes, fixes a maximum for each class, by allowing a "tolerance" of only two ounces per pound in excess of the minimum, the weights to be determined by averaging loaves of each class in lots of twenty-five, and to apply for twenty-four hours after baking. The evidence demonstrated that owing to normal evaporation from bread under conditions of temperature and humidity often prevailing in Nebraska, it is impossible to manufacture good bread in the regular way without frequently exceeding the prescribed tolerance and incurring the burden of penalties prescribed by the statute, and that compliance would necessitate selection of ingredients making an inferior and unsalable bread, or wrapping the loaves, although wrapping is not required by the statute and unwrapped loaves are wholesome food in much demand by consumers. *Held*, That, in the circumstances, the provision that average weights shall not exceed these maxima is not necessary to protect purchasers against imposition and fraud by short weights, and not calculated to effectuate that purpose; and that it subjects bakers and sellers of bread to restrictions essentially unreasonable and arbitrary; and is therefore repugnant to the Fourteenth Amendment. P. 514.

108 Neb. 674, reversed.

ERROR to a judgment of the Supreme Court of Nebraska affirming a decree dismissing a suit brought by bakers and sellers of bread against state officials to restrain enforcement of a statute regulating the weights of loaves.

Mr. Matthew A. Hall, with whom *Mr. Raymond G. Young* and *Mr. Carroll S. Montgomery* were on the briefs, for plaintiffs in error.

Laws fixing specific weights for loaves of bread are construed to be only against short weights, and do not prohibit greater weights than the standards provided.

People v. *Wagner*, 86 Mich. 594; *State* v. *Huber*, 4 Boyce, 259; *Allion* v. *Toledo*, 99 Oh. St. 416; *Chicago* v. *Schmidinger*, 243 Ill. 167; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Chicago* v. *Schweifurth*, 174 Ill. App. 64.

The same is true in regard to other articles. *Spokane* v. *Arnold*, 73 Wash. 256; *State* v. *Co-Operative Store Co.*, 123 Tenn. 399.

A law fixing a maximum as well as a minimum weight for a loaf is illegal and invalid. *Harwood* v. *Williamson*, 1 Sask. L. Rep. 66.

Dangerous articles are subject to regulation by law, where harmless articles are exempt. *Williams* v. *Walsh*, 79 Kan. 212; s. c. 222 U. S. 415.

There must be some logical connection between the object sought to be accomplished by the law and the means prescribed. *Chicago* v. *Chicago, etc. Ry. Co.*, 275 Ill. 30; *Chicago, etc. Ry. Co.* v. *State*, 47 Neb. 549.

The right to contract is property. Taylor, Due Process of Law, § 265, pp. 490, 491; *State* v. *Goodwill*, 33 W. Va. 179; *Braceville* v. *People*, 147 Ill. 66.

Laws enacted under the guise of police regulation must have some relation to the public health, welfare or safety. *Smiley* v. *McDonald*, 42 Neb. 5; *Wenham* v. *State*, 65 Neb. 394; *Union Pacific Ry. Co.* v. *State*, 88 Neb. 247; *State* v. *Withnell*, 91 Neb. 101; *Urbach* v. *Omaha*, 101 Neb. 314; *Mugler* v. *Kansas*, 123 U. S. 623.

The regulation must not be an arbitrary and unreasonable interference with the rights of individuals. *In re Anderson*, 69 Neb. 686; *Lawton* v. *Steele*, 152 U. S. 133; *Connecticut Co.* v. *Stamford*, 95 Conn. 26.

Police power means the power of the State to prohibit all things hurtful to the comfort, safety or welfare of the community. *License Cases*, 5 How. 504.

The police power does not justify an enactment merely because there is a possibility of danger which it is sought to avert. *Ex parte Whitewell*, 98 Cal. 73; Freund, Police

Power, § 494; *State* v. *Sperry*, 94 Neb. 785; *Young* v. *Commonwealth*, 101 Va. 853; *State* v. *Ramseyer*, 73 N. H. 31.

If an invalid portion of an act formed an inducement to the passage of the act, the whole act will be declared invalid. *Trumble* v. *Trumble*, 37 Neb. 340; *State* v. *Poynter*, 59 Neb. 417; *State* v. *Junkin*, 85 Neb. 1.

The Constitution is violated when persons engaged in the same business are subjected to different restrictions. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Louisville & Nashville R. R. Co.* v. *Bosworth*, 230 Fed. 191; *Standard Oil Co.* v. *Red River Parish Police Jury*, 140 La. 42; *Black* v. *State*, 113 Wis. 205; *In re Von Horne*, 74 N. J. Eq. 600.

A law palpably unreasonable and arbitrary and exceeding all reasonable classification, is not within the police power of a State. *Price* v. *Illinois*, 238 U. S. 446; *Meyer* v. *Nebraska*, 262 U. S. 390; *Mugler* v. *Kansas*, 123 U. S. 623.

Determination by the legislature of what constitutes proper exercise of police power is subject to supervision by the courts. *Meyer* v. *Nebraska, supra; Mugler* v. *Kansas, supra.*

The business of baking is not clothed with a public interest. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

Freedom of contract is the general rule, and restraint is the exception; and restraint can only be justified by exceptional circumstances. *Adkins* v. *Children's Hospital*, 261 U. S. 525; *State* v. *Edgecomb*, 108 Neb. 859.

Only public necessity can justify the exercise of the police power by a State. *Chicago, etc. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *State* v. *Edgecomb, supra; People* v. *Klinck*, 214 N. Y. 121.

The constitutionality of a law may depend upon the result of its practical operation. *Erickson* v. *Nine Mile Irrig. Dist.*, 192 N. W. 694.

Mr. Lloyd Dort, Assistant Attorney General of the State of Nebraska, with whom *Mr. O. S. Spillman*, Attorney General, was on the brief, for defendants in error.

Equity will not interfere with the enforcement of criminal statutes.

The mere possibility that property rights of an individual may be affected is not sufficient.

In the present case no criminal prosecution had been instituted and even before the law was in operation it was attacked. The bakers have never made any *bona fide* effort to comply with the law.

The law in question does not violate the Constitution of the United States nor that of Nebraska.

The law is a regulatory law and it does not in any manner confiscate the property or business of the bakers nor prohibit them from continuing their occupation.

It is claimed that the law makes no provision for the punishment of nonresidents of the State. It is not required, however, that the law be uniform except as operating within the jurisdiction of the State.

It has been definitely decided that the regulation of the manufacture and sale of food articles, bread in particular, is a proper subject of legislation. *Schmidinger* v. *Chicago*, 226 U. S. 578; *Chicago* v. *Schmidinger*, 243 Ill. 167; *People* v. *Wagner*, 86 Mich. 594; *State* v. *Normand*, 76 N. H. 541; *State* v. *Layton*, 160 Mo. 474.

The bread law is not invalid under § 14, Art. III, of the Constitution of Nebraska, which provides that no bill shall contain more than one subject and that the same shall be clearly expressed in the title. *Merrill* v. *State*, 65 Neb. 1.

The law does not deprive the bakers of their vested property rights without compensation. *Enos* v. *Hanff*, 95 Neb. 184; *Chicago, etc. Ry. Co.* v. *State*, 47 Neb. 549.

The law cannot be held unreasonable because it limits the size of the loaves to specified weights or because it

does not permit loaves of other weights to be made for sale by special contract. *Schmidinger* v. *Chicago,* 226 U. S. 578.

The mere fact that there may be expense in connection with change of appliances and equipment of the bakeries does not constitute a taking of vested property rights without compensation, in violation of law. The right to operate any business is always dependent upon the general welfare of the people and the operation of the police power. The legislature has determined that the law is necessary on account of the frauds being perpetrated upon the purchasing public and in order that the public may be advised of the merchandise which they receive for the purchase price.

This being true, it appears that any of the property of the bakers which can be used only for the baking of bread which is in fraud of the public would have been used in the perpetration of a fraud upon the public in the production of short weight loaves.

It is contended by the bakers that they fluctuated the sizes of the loaves to meet the cost of the ingredients. The legislature, however, has said with good reasoning that it is just as easy for the bakers to give a standard weight loaf and to fluctuate the price instead of the weight of the loaves.

Considering the minimum weight provision in the law, it has been decided that laws prescribing standard size loaves of bread and prohibiting with minor exceptions the sale of other sizes, should be sustained. *Schmidinger* v. *Chicago, supra; Mobile* v. *Yuille,* 3 Ala. 137; *Chicago* v. *Schmidinger,* 243 Ill. 167; *People* v. *Wagner, supra; Commonwealth* v. *McArthur,* 152 Mass. 522.

The law is uniform in operation within the State.

Necessity for the law is exclusively a legislative question. *State* v. *Morehead,* 99 Neb. 527; *Schultz* v. *State,* 89 Neb. 34; *State* v. *Collum,* 138 La. 395; *Halter* v. *State,* 74 Neb. 757; 205 U. S. 34.

Plaintiffs in error have introduced much evidence concerning the scientific baking of bread. If, after frequent attempts to bake bread which complies with the provisions of the law, they had failed, such evidence would have some bearing. They failed to make one attempt to comply with the law. The evidence shows that bread may easily be baked within the two ounce tolerance.

MR. JUSTICE BUTLER delivered the opinion of the Court.

An act of the legislature of Nebraska, approved March 31, 1921 (Laws 1921, c. 2, p. 56)[1] provides that every loaf of bread made for the purpose of sale, or offered for sale, or sold, shall be one-half pound, one pound, a pound and a half, or exact multiples of one pound, and prohibits loaves of other weights. It allows a tolerance in excess of the specified standard weights at the rate of two ounces per pound

[1] An Act establishing a standard weight loaf of bread for the State of Nebraska and providing a penalty. . . .

Section 1. Department of agriculture to enforce.—It shall be the duty of the Department of Agriculture to enforce all provisions of this Act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this Act.

Sec. 2. Bread, standards of weight.—Every loaf of bread made or procured for the purpose of sale, sold, exposed or offered for sale in the State of Nebraska shall be the following weights avoirdupois, one-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

Sec. 3. Tolerance, how determined.—A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not

and no more, and requires that the specified weight shall be the average weight of not less than 25 loaves, and that such average shall not be more than the maximum nor less than the minimum prescribed. Violations of the act are punishable by a fine or imprisonment.

Four of the plaintiffs in error are engaged in Nebraska in the business of baking and selling bread for consumption there and in other States. Their total annual output is alleged to be 23,500,000 pounds. The other plaintiff in error is a retail grocer at Omaha, and sells bread to consumers principally in single loaf lots. They brought this suit against the Governor and the Secretary of the Department of Agriculture of the State to restrain the enforcement of the act on the ground, among others, that it is repugnant to the due process clause of the Fourteenth Amendment. The State Supreme Court sustained the act. The case is here on writ of error.

Plaintiffs in error do not question the power of the State to enact and enforce laws calculated to prevent the sale of loaves of bread of less than the purported weight; but they contend that the provision fixing the maximum weights in this statute is unnecessary, unreasonable and arbitrary.

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be less than the minimum nor more than the maximum prescribed by this Act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale.

Sec. 4. Penalties for violation.—Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days. Provided, however, that upon the second and all subsequent convictions for the violation of any of the provisions of this Act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days.

The brief of the Attorney General states that the law is concerned with weights only. The State Supreme Court said (108 Nebr. 674, 678): "It is to prevent a loaf of one standard from being increased in size until it can be readily sold for a loaf of a larger standard that a maximum weight is fixed. The test is reasonableness. . . . (p. 679.) The statutory margin or tolerance being two ounces to the pound, can bakers, for example, make a loaf 18 ounces in weight that will weigh not less than 16 ounces 24 hours after it is baked? The tests and proofs on behalf of the State tend to show that the regulation is reasonable and can be observed at all times. [In most of these tests, wrapped loaves were used.] It is fairly inferable from the evidence adduced by plaintiffs that compliance with the regulation is practicable most of the time, but that tested by their experiments as made, there are periods when the operation of natural laws will prevent compliance with legislative requirements. There are a number of reasons, however, why the tests made to prove unreasonableness should not be accepted as conclusive. If correctly understood, these tests were made with bread manufactured in the regular course of business, without any attempt to change ingredients or processes or to retard evaporation of moisture in loaves by the use of wax-paper or other means. . . . (p. 680.) The act of the legislature does not fix prices but leaves bakers free to make reasonable charges for bread wrapped in inexpensive wax-paper for its preservation in transportation and in the markets. . . . Precautions to retard evaporation of moisture in bread for the purpose of keeping it in a good state of preservation for 24 hours may be required as an incidental result of a police regulation establishing standards of maximum weights for loaves of bread. Palatableness, a quality demanded by the public, is affected by excessive evaporation, if food value is not. . . . The evidence does not prove that, if reasonable means or precautions are taken by plaintiffs

and other bakers to retard evaporation, they cannot comply with the act of the legislature, or that the regulation is unreasonable."

Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. *Schmidinger* v. *Chicago*, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Lawton* v. *Steele*, 152 U. S. 133, 137; *Meyer* v. *Nebraska*, 262 U. S. 390, 399. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. *Meyer* v. *Nebraska, supra; Welch* v. *Swasey*, 214 U. S. 91, 105; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 556; *Lawton* v. *Steele, supra.*

The loaf is the usual form in which bread is sold. The act does not make it unlawful to sell individual loaves weighing more or less than the standard weights respectively. Loaves of any weight may be sold without violation of the act, if the average weight of not less than 25 does not exceed the permitted maximum or fall short of the specified nominal weights during 24 hours after baking. Undoubtedly, very few private consumers purchase at one time as many as 25 loaves of the same standard size or unit. And it is admitted that the sale of a lesser number not within the permitted tolerance does not constitute an offense. Plaintiffs in error do not claim that it is impossible to make loaves which for at least 24 hours after baking will weigh not less than the specified minimum weights, but they insist that the difference per-

mitted by the act between the weight of loaves when taken from the oven and their weight 24 hours later is too small, and that it is impossible for bakers to carry on their business without sometimes exceeding the maximum or falling short of the minimum average weights. Any loaves of the same unit at any time on hand during 24 hours after baking may be selected to make up the 25 or more to be weighed in order to test compliance with the act. Therefore, if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven or fall below the minimum weight within 24 hours, it will always be possible to make up lots of 25 or more loaves whose average weight will be above or below the prescribed limits.

The parties introduced much evidence on the question whether it is possible for bakers to comply with the law. A number of things contribute to produce unavoidable variations in the weights of loaves at the time of and after baking. The water content of wheat, of flour, of dough [2] and of bread immediately after baking varies substantially and is beyond the control of bakers. Gluten is an important element in flour, and flour rich in gluten requires the addition of more water in breadmaking and makes better bread than does flour of low or inferior gluten content. Exact weights and measurements used

[2] Wheat bread dough is the dough consisting of a leavened and kneaded mixture of flour, potable water, edible fat or oil, sugar and / or other fermentable carbohydrate substance, salt, and yeast, with or without the addition of milk or a milk product, of diastatic and / or proteolytic ferments, and of such limited amounts of unobjectionable salts as serve solely as yeast nutrients, and with or without the replacement of not more than three per cent of the flour ingredient by some other edible farinaceous substance. (Definition of Joint Committee on Definitions and Standards, September 28, 1922, and approved by the Association of American Dairy Food and Drug Officials, October 5, 1922, and by the Association of Official Agricultural Chemists, November 17, 1922.)

in doughmaking cannot be attained. Losses in weight while dough is being mixed, during fermentation and while the bread is in the oven, vary and cannot be avoided or completely controlled. No hard and fast rule or formula is followed in breadmaking. There are many variable elements. Bread made from good flour loses more weight by evaporation of moisture after baking than does bread made from inferior flours. Defendants' tests were made principally with loaves which were wrapped so as to retard evaporation; and it was shown that by such wrapping the prohibited variations in weight may be avoided. On the other hand, the evidence clearly establishes that there are periods when evaporation under ordinary conditions of temperature and humidity prevailing in Nebraska exceeds the prescribed tolerance and makes it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale. The tests which were described in the evidence and referred to in the opinion are not discredited because "made with bread manufactured in the regular course of business." The reasonableness of the regulation complained of fairly may be measured by the variations in weight of bread so made. The act does not require bakers to select ingredients or to apply processes in the making of bread that will result in a product that will not vary in weight during 24 hours after baking as much as does bread properly made by the use of good wheat flour. As indicated by the opinion of the State Supreme Court, ingredients selected to lessen evaporation after baking would make an inferior and unsalable bread. It would be unreasonable to compel the making of such a product or to prevent making of good bread in order to comply

with the provisions of the act fixing maximum weights. The act is not a sanitary measure. It does not relate to the preservation of bread in transportation or in the market; and it applies equally whether the bread is sold at the bakeries or is shipped to distant places for sale. Admittedly, the provision in question is concerned with weights only. The act does not regulate moisture content or require evaporation to be retarded by the wrapping of loaves or otherwise. The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food value. It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. It having been shown that during some periods in Nebraska bread made in a proper and usual way will vary in weight more than at the rate of two ounces to the pound during 24 hours after baking, the enforcement of the provision necessarily will have the effect of prohibiting the sale of unwrapped loaves when evaporation exceeds the tolerance.

No question is presented as to the power of the State to make regulations safeguarding or affecting the qualities of bread. Concretely, the sole purpose of fixing the maximum weights, as held by the Supreme Court, is to prevent the sale of a loaf weighing anything over nine ounces for a one pound loaf, and the sale of a loaf weighing anything over eighteen ounces for a pound and a half loaf, and so on. The permitted tolerance, as to the half pound loaf, gives the baker the benefit of only one ounce

out of the spread of eight ounces, and as to the pound loaf the benefit of only two ounces out of a like spread. There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision, that the average weights shall not exceed the maximums fixed, is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment.

Judgment reversed.

MR. JUSTICE BRANDEIS, (with whom MR. JUSTICE HOLMES concurs) dissenting.

The purpose of the Nebraska standard-weight bread law is to protect buyers from short weights and honest bakers from unfair competition. It provides for a few standard-size loaves, which are designated by weight, and prohibits, as to each size, the baking or selling of a loaf which weighs either less or more than the prescribed weight. *Schmidinger* v. *Chicago,* 226 U. S. 578, settled that the business of making and selling bread is a permissible subject for regulation; that the prevention of short weights is a proper end of regulation; that the fixing of standard sizes and weights of loaves is an appropriate means to that end; and that prevalent marketing frauds make the enactment of some such protective legislation

permissible. The ordinance there upheld, besides defining the standard-weight loaf, required that every loaf should bear a label stating the weight; and to sell a loaf weighing less than the weight stated in the label was made a misdemeanor.

The Nebraska regulation is in four respects less stringent than the ordinance upheld in the *Schmidinger Case:* (1) It provides for a tolerance. That is, it permits a deviation from the standard weight of not more than two ounces in a pound, provided that the prescribed standard weight shall be determined by averaging the weights of not less than twenty-five loaves of any one unit. (2) The prescribed weight applies for only twenty-four hours after the baking. (3) The weight is to be ascertained by weighing on the premises where the bread is baked. (4) No label stating the weight is required to be affixed to the loaf. That is, as a representation of the weight, the familiar size of the loaf is substituted for the label. On the other hand, the Nebraska requirement is more stringent than the Chicago ordinance, in that it prohibits making and selling loaves which exceed the prescribed weight by more than the tolerance. This prohibition of excess weights is held to deny due process of law to bakers and sellers of bread. In plain English, the prohibition is declared to be a measure so arbitrary or whimsical that no body of legislators acting reasonably could have imposed it. In reaching this conclusion, the Court finds specifically that this prohibition "is not necessary for the protection of purchasers against imposition and fraud by short weight"; that it "is not calculated to effectuate that purpose"; and that the practical difficulties of compliance with the limitation are so great that the provision "subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary."

To bake a loaf of any size other than the standard is made a misdemeanor. Why baking a loaf which weighs

less than the standard size should be made a crime is obvious. Such a loaf is a handy instrument of fraud. Why it should be a crime to bake one which weighs more than the standard is not obvious. The reason given is that such a loaf, also, is a handy instrument of fraud. In order that the buyer may be afforded protection, the difference between the standard sizes must be so large as to be evident and conspicuous. The buyer has usually in mind the difference in appearance between a one-pound loaf and a pound-and-a-half loaf, so that it is difficult for the dealer to palm off the former for the latter. But a loaf weighing one pound and five ounces may look so much like the buyer's memory of the pound-and-a-half loaf that the dealer may effectuate the fraud by delivering the former. The prohibition of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size.[1]

With the wisdom of the legislation we have, of course, no concern. But, under the due process clause as construed, we must determine whether the prohibition of excess weights can reasonably be deemed necessary; whether the prohibition can reasonably be deemed an appropriate means of preventing short weights and incidental unfair practices; and whether compliance with the limitation prescribed can reasonably be deemed practicable. The determination of these questions involves an enquiry into

[1] See Charles C. Neale, "Weight Standardization of Bread", 13 Conf., Weights & Measures, pp. 115, 116; C. J. Kremer, "Bread Weight Legislation and Retail Bakers", 16 Conf., Weights & Measures, pp. —; Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 11, 12. Compare 4 Conf., Weights & Measures, pp. 18, 19; 5 Conf., Weights & Measures, p. 113; 1914 Wisconsin Dairy, Food and Weights and Measures Dept., Bul. No. 14, p. 18; 1920 New Jersey Weights and Measures Dept., p. 18; 1921 Chicago Weights and Measures Dept., p. 4.

facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws.

First. Why did legislators, bent only on preventing short weights, prohibit, also, excessive weights? It was not from caprice or love of symmetry. It was because experience had taught consumers, honest dealers and public officials charged with the duty of enforcing laws concerning weights and measures that, if short weights were to be prevented, the prohibition of excessive weights was an administrative necessity. Similar experience had led to the enactment of a like prohibition of excess quantities in laws designed to prevent defrauding, by short measure, purchasers of many other articles.[2] It was similar ex-

[2] A similar policy, enacted by statute or regulation, is applied to fish, pork, milk, gasoline, hay, fruits, vegetables and other commodities. See Maryland, Laws of 1817 (Session of December, 1817 to February, 1818), c. 114, § 1; New York, Laws of 1910, c. 470, §§ 5a, 5b, Laws of 1912, c. 81, §§ 240, 252, 1911 Weights and Measures Dept., p. 46; Maine, 1913 Pub. Laws, c. 81, § 1, 1916 Rev. Stat. c. 37, § 20, 1919 Rev. Stat. c. 37, § 20; Arizona, 1913 Laws, § 26; Massachusetts, 1921 Gen. Laws, c. 23, § 85, c. 98, § 15. See specifications and tolerances adopted by the department of weights and measures in Arizona, 1921; California, 1914, 1915, 1919, Report of Dept. Weights & Measures, 1917–1918, p. 65; Indiana, 1913; Massachusetts, 1917,

perience which had led those seeking to prevent the sale of intoxicating liquor to enact the law which prohibits the sale of malt liquor, although not containing any alcohol (sustained in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192), and that which prohibits the sale of liquor containing more than one-half of one per cent. of alcohol (sustained in *Ruppert* v. *Caffey*, 251 U. S. 264). Compare *Armour & Co.* v. *North Dakota*, 240 U. S. 510.

In January, 1858, the late corporation of Washington adopted an ordinance fixing a standard-weight loaf, and establishing an excess tolerance.[3] The standard-weight bread ordinance adopted by Chicago in 1908 and sustained in the *Schmidinger Case* is said to have been the first standard-weight bread law in the United States enacted in this century.[4] Prior thereto many different kinds of legislation had been tried in the several States and cities

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Report of Sealer of Weights and Measures for Worcester, Mass., 1905, p. 5; New York, 1910, 1913, 1915; North Dakota, 1919; Pennsylvania, 1921; Tennessee, 1914; Vermont, 1920; Washington, 1913; Wisconsin, 1911, 1913; District of Columbia, 1897, 1901. See, also, regulations promulgated by the Secretary of Agriculture pursuant to § 4 of the Standard Container Act, Aug. 31, 1916, c. 426, 39 Stat. 673; specifications and tolerances adopted by the Conference on Weights and Measures, 1915, 1916, 1920. And see Report, Conf. Weights & Measures, 1911, pp. 127, 129; 1913, pp. 278, 284, 289; 1914, p. 57, *et seq.*; 1916, p. 130 *et seq.*; 1919, p. 169, *et seq.*; 1920, p. 110. Compare *Turner* v. *Maryland*, 107 U. S. 38, 50, 51, note, 53 note, 54, 56.

[3] Permitted a tolerance in excess of 2 ounces on the 1 pound loaf; 3 ounces on the 2 pound loaf; and 4 ounces on the 4 pound loaf. The ordinance, promulgated by the mayor and aldermen of the late corporation of Washington, Jan. 7, 1858, was not questioned until Aug. 31, 1908. In *District of Columbia* v. *Hauf*, 33 App. D. C. 197, it was held that the Organic Act of Feb. 21, 1871, 16 Stat. 419, repealed this ordinance by implication. Up to the date of the decision, its operation had been entirely satisfactory. See statement of W. C. Haskell, 5 Conf., Weights & Measures, pp. 19–22.

[4] See Hearings on H. R. 4533, Feb. 18, 19, 1924, p. 18; 5 Conf., Weights & Measures, pp. 26–29.

with a view to preventing short weights.[5] Experience had shown the inefficacy of those preventive measures. Experience under the Chicago ordinance indicated the value of introducing the standard-weight loaf; but it proved, also, that the absence of a provision prohibiting excess weights seriously impaired the efficacy of the ordinance.[6] When in 1917 the United States Food Administration was established, pursuant to the Lever Act (August 10, 1917, c. 53, 40 Stat. 276), the business of baking came under its supervision and control; and provision was made for licensing substantially all bakers.[7] The protection of buyers of bread against the fraud of short weight was deemed essential.[8] After an investigation which occupied three months, the Food Administration issued the regu-

[5] See *Mayor and Aldermen of Mobile* v. *Yuille*, 3 Ala. 137; *Kansas* v. *McCool*, 83 Kans. 428; *Guillotte* v. *New Orleans*, 12 La. Ann. 432; *Commonwealth* v. *McArthur*, 152 Mass. 522; *People* v. *Wagner*, 86 Mich. 594; *Paige* v. *Fazackerly*, 36 Barb. 392. Also brief for plaintiff in error (appendix) in *Schmidinger v. Chicago*, 226 U. S. 578. Compare *Harwood* v. *Williamson*, 1 Sask. L. Rep. 66.

[6] See Report Chicago Dept. Weights & Measures, 1913, p. 6; 1917, p. 6; 1918, p. 3. See also 1911 New York Dept. Weights & Measures, p. 46; "Weights and Prices of Wheat Bread in Mass.," compiled by director of Standards, Jan. 1, 1924. Compare Report, Conf. on Weights & Measures, 4, pp. 18, 19; 6, p. 47; 8, pp. 18, 19; 9, pp. 20, 22; 14, pp. 30, 35. The new ordinance in Chicago is operating successfully. See 1921 Chicago Dept. Weights & Measures, p. 4; 14 Conf., Weights & Measures, p. 36.

[7] See 1917 Report U. S. Food & Fuel Administrations, pp. 10, 11, 36–38.

[8] The license regulations issued by Herbert Hoover, with the approval of the President, on November 16, 1917 were "worked out to a large degree with the bakers themselves with the co-operation of the Federal Trade Commission and the Agricultural Department." See Letter of Herbert Hoover to the President, Nov. 6, 1917. They were aided by a Consumers' Committee. The Food Administration had, also, the results of an investigation, which had been theretofore conducted by Benj. R. Jacobs of the Bureau of Chemistry, on the marketing of bread in the City of Washington. In his "Preliminary Report,

lations by which licensees were to be governed. No standard-weight bread statute had then been enacted in

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B. R. Jacobs to Duncan McDuffie, Aug. 14, 1917," he recommended: "The standardization of the loaf of bread by weight . . . (c) because when weights are declared they are made in such small-size type that it is very difficult for the consumer to see it and also when the weight is declared the bakers seem to enter into an agreement whereby they all mark the same weight on the bread regardless of the size, thus nullifying to a great extent the value of this declaration."

The "Preliminary Report on the Bread Problem, September 29, 1917," of Duncan McDuffie includes the following recommendation (p. 47): "The Food Administration is charged, not only with seeing that the public secures its bread at the lowest possible price, but that in making its purchases of this commodity it receives a square deal. In my opinion, both these objects can best be obtained by permitting bread to be sold only in units of fixed weight. As these units I recommend loaves weighing, twelve hours after being baked, not less than 16 nor more than 17 ounces, and not less than 24 or more than 25½ ounces and multiples of both these weights."

Ordinances in force, at that time, in Chicago, Dallas, Detroit, Jackson, Minneapolis, Seattle, Tacoma and Washington, and the statutes of Kansas, Idaho, Nevada and North Dakota provided for a few standard size loaves; and some of these provided, further, that the loaves must be labeled with the weight, if not in these units. (See Appendix.) Referring to such regulations, the report says (p. 49): "Many of these regulations permit the manufacture of bread of other sizes provided that bread is labeled with its exact weight. Tolerances are also permitted in some instances on account of shrinkage of weight due to evaporation of the moisture contained in the bread. Many of these regulations provide merely that bread shall not be produced in units weighing less than those fixed. The result of this regulation has been that bakers labeled the bread with the unit weight next below its actual weight, thus making standardization ineffective.

"In many instances these regulations have not produced satisfactory results. This may be attributed to lack of universality, evasion on the part of the baker, or failure of the law to provide an upper as well as a lower limit of weight. There is no reason to think that a regulation, providing that bread shall be sold in units of fixed weight with a limited upward variation to provide for inequalities of evaporation and scaling, if applied universally, will not prove an

any State.[9] The regulations adopted established standard-weight loaves; prohibited the sale of loaves other than of the standard weights; and limited the excess weight to not more than one ounce to the pound.[10] This provision remained in force unchanged until the licensing system was abrogated on December 19, 1918 (after the Armistice).[11]

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effective protection of the public and assist in reducing the cost of bread through fixing competition on price alone."

See "Report of the Federal Trade Commission on Bakery Business in United States," Nov. 3, 1917, made at the request of Mr. Hoover, and published by the United States Food Administration with "Report of Bakery Section of Food Administration," November, 1917. In the latter, Duncan McDuffie (pp. 20–21) recommended the following regulation as to weights:—"All bread should be baked in loaves weighing, unwrapped, 12 hours after baking, not less than 16 nor more than 17 and not less than 24 nor more than 25½ ounces and multiples thereof. Any greater variation in weights than those indicated may defeat the whole object of standardization."

[9] See "Preliminary Report on the Bread Problem, Sept. 29, 1917," Appendix. In 1916, the California state superintendent of weights and measures promulgated a regulation fixing a standard-weight loaf and permitting a tolerance in excess. It was not enforced, because of the opinion expressed by the attorney general that the regulation was beyond the scope of the official's authority. See 1915–16 Calif. Dept. Weights & Measures, pp. 63–66. In 1917, due to the influence of the bakers of the State, the legislature passed an amendment to the California weights and measures law which would clearly prevent the state superintendent from fixing a standard-weight loaf. An ordinance, fixing a standard-weight loaf with an excess tolerance, was prepared by the state superintendent and was "enacted in all large counties, cities and many towns throughout the state and has been effective in the uniform enforcement of a standard of weight for bread." 1919–20, *op. cit.*, pp. 30–31. In 1921, a law was passed incorporating these same features. Act of June 2, 1921, c. 704.

[10] The first "Rules and Regulations Governing Licensees Manufacturing Bakery Products," effective Dec. 10, 1917, issued by the United States Food Administration, adopted the recommendation of the November Report, which limited the tolerance for excess weights to one ounce in the pound.

[11] In some other respects, the regulations were changed from time to time. See "Revised Rules and Regulations, etc.," effective Feb-

The efficacy of the prohibition of excess weights as a means of preventing short weights having been demonstrated by experience during the period of Food Administration control, a widespread demand arose for legislative action in the several States to continue the protection which had been thus afforded. Dissatisfaction with the old methods of regulation was expressed in a number of States.[12] During the years 1919 to 1923, standard-weight bread laws, containing the prohibition of excess weights, were enacted in twelve States.[13] Similar bills were introduced in others.[14] Congress enacted such a law for the

ruary 1, 1918, pp. 14, 15; "Special License Regulations, No. XIII, Manufacturers of Bakery Products," including May 3, 1918, Rule 2, p. 8; "Special License Regulations, No. XIII, Manufacturers of Bakery Products," Second Issue, effective September 1, 1918, Rule 2, p. 5.

[12] Washington changed from a law permitting the sale of any weight bread provided that it is properly labeled to a law fixing a standard-weight loaf with an excess tolerance. See Laws of 1913, c. 52, § 9; Laws of 1923, c. 126, § 1. West Virginia, Utah, Nevada, Detroit and Milwaukee desire to do likewise. See 1922, W. Va. Dept. Weights & Measures, pp. 14–15; 1920 Utah Dept. Weights & Measures, p. 61; 13 Conf., Weights & Measures, pp. 188, 189; Hearings on H. R. 4533, Mar. 3, 1924. In New Jersey, the department of weights and measures opposed a law similar to the Massachusetts act which embodied an alternative provision. See Report, Dept. Weights & Measures, 1921, p. 20; 1922, p. 14.

[13] See Indiana, Laws of 1919, c. 56, § 9; Montana, Laws of 1919, c. 155, § 1; Oregon, Laws of 1919, c. 82, § 1; South Dakota, Laws of 1921, c. 239, § 1; California, Laws of 1921, c. 704, §§ 1, 2; Connecticut, Laws of 1921, c. 261, §§ 2, 3, 4; Nebraska, Laws of 1921, c. 2, §§ 2, 3; Ohio, Laws of 1921, §§ 16, 17, pp. 604, 607; Texas, Gen. Laws, 1921, c. 63, p. 129; Massachusetts, Laws of 1922, c. 186, §§ 1, 2, 3; Washington, Laws of 1923, c. 126, § 1, Rem. Comp. Stat., § 11,612; Wisconsin, Laws of 1923, c. 123, §§ 1, 2.

[14] Standard weight bread legislation was recommended in the reports of the departments of weights and measures in Arizona, 1922, pp. 13, 14; District of Columbia, 1914, pp. 3, 6; 1916, p. 4; 1917, p. 6; Maine, 1913, p. 1; Massachusetts, 1916, p. 16; 1917, pp. 14, 15; 1919, p. 14; New Jersey, 1913, p. 24; 1916, p. 11; 1920, p. 18; 1921,

District of Columbia.[15] Hawaii and Porto Rico did likewise.[16] The national conference on weights and measures indorsed a similar provision.[17] A bill embodying the same principles, applicable to sales of bread in interstate commerce, prepared by the Department of Agriculture and the Department of Commerce, was introduced in 1923 and is now pending.[18] At the congressional hearings thereon, it was shown that the provision against excess weights is deemed necessary by a large majority of the bakers, as well as by consumers and by local public officials charged with the duty of preventing short weights.[19] In Nebraska the demand for the legislation under review was general and persistent. It was enacted

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p. 22; 1922, p. 14; New York, 1911, pp. 12, 40–41; Oregon, 1917, p. 7; Utah, 1920, p. 61; Vermont, 1920, p. 57; West Virginia, 1922, p. 14; Wisconsin, 1916–1917, p. 137, 1919–1920, pp. 18, 34. Bills were introduced in the legislatures of Maine, Maryland, Mississippi, New Jersey, New York, Pennsylvania, Vermont, West Virginia and Wisconsin. See 6 Conf., Weights & Measures, p. 22; 5 *ibid*, p. 88; 1919–1920 Wisconsin Weights & Measures, p. 147; 1922 New Jersey Weights & Measures, p. 14; 1921, *ibid*, p. 19. See Hearings on H. R. 4533, Feb. 18, 19, testimony of Congressman Brand of Ohio, pp. 9, 10; F. C. Blenck, Bureau of Chemistry, Department of Agriculture, pp. 11–15; F. S. Holbrook, Chief of the Weights and Measures Division, Bureau of Standards, pp. 16–19.

[15] See Act of March 3, 1921, c. 118, § 13, 41 Stat. 1217, amended Aug. 24, 1921, c. 92, 42 Stat. 201.

[16] See Hawaii, Laws of 1919, Act 176, § 1; Porto Rico, Laws of 1917, Act No. 13, §§ 1, 2, 3.

[17] See 14 Conf., Weights & Measures, pp. 72, 73, 81; 15 *ibid*, p. 79. See also 13 *ibid*, p. 174. The conference changed from an alternative measure, like the Massachusetts law, to a standard weight measure with an excess tolerance. See 8 Conf., Weights & Measures, pp. 278, 284, 289; 6 *ibid*, pp. 132, 133, 157.

[18] H. R. 4533, Sixty-eighth Congress, first session. See Hearing before the Committee on Agriculture, H. R. 4533, Feb. 18, 19, Mar. 3, 1924.

[19] See Hearings on H. R. 4533, Feb. 18, 19, pp. 11, 12, 16, 20. The opponents of the bill did not question the necessity of an excess weight prohibition. See Hearing of March 3, 1924.

after a prolonged public discussion carried on throughout the State as well as in the legislature.[20] Can it be said, in view of these facts, that the legislators had not reasonable cause to believe that prohibition of excess weights was necessary in order to protect buyers of bread from imposition and honest dealers from unfair competition?

Second. Is the prohibition of excess weights calculated to effectuate the purpose of the act? In other words, is it a provision which can reasonably be expected to aid in the enforcement of the prohibition of short weights? That it has proved elsewhere an important aid is shown by abundant evidence of the highest quality. It is shown by the fact that the demand for the legislation arose after observation of its efficacy during the period of Food Administration control.[21] It is shown by the experience

[20] See Nebraska State Journal, Jan. 11, 16; Feb. 9, 11, 13, 19, 23, 24; March 2, 4, 7, 8, 9, 13, 15, 16, 17, 21, 23, 30, 31; April 1, 1921. See also Bakers Weekly, Feb. 19, 1921, p. 52; Feb. 26, 1921, p. 42; Mar. 12, 1921, p. 48.

[21] "What the bakers had thought impossible before the creation of the Food Administration worked like a charm, and the trade, being relieved of the destructive competition in weight and the necessity of constantly watching the juggling of weight by their competitors, could settle down to the more important problem of furnishing the people, even under adverse conditions, with quality bread, at a price which, despite the extraordinary and oftentimes exasperating circumstances, made bread still the cheapest and best food on the American table. . . . This standard weight insisted upon by the Food Administration is one of the regulations referred to as having been found so advantageous by the majority of bakers that in a great many cities the rule has been either voluntarily adopted as a sound business practice by the bakers or, at the instance of the trade, has been incorporated into new afterwar bakery laws and regulations." See 14 Conf., Weights & Measures, p. 27. See also Bakers Weekly, Dec. 20, 1919, p. 49. There is a similar movement in England to incorporate war experience (Bread Order, May 18, 1918, No. 547 (8)) into permanent legislation. See Bakers Weekly, Jan. 15, 1921, p. 40. The Montana bakers in convention approved a law similar to the

of the several communities in which the provision has since been in operation: Chicago; [22] California; [23] Ohio; [24]

Nebraska act. See Bakers Weekly, Feb. 1, 1919, p. 55. The present Oregon law was sponsored by the bakers. See Bakers Weekly, Mar. 15, 1919, p. 42. The "Federal Bread Bill" has the approval of the retail bakers of the country. See Hearings on H. R. 4533, Mar. 3, 1924. See also Statements by E. M. Rabenold, 14 Conf., Weights & Measures, pp. 43, 74–75; Charles C. Neale, "Weight Standardization of Bread", 13 *ibid*, p. 115.

[22] See testimony of William F. Cluett, Chief Deputy Inspector of Weights and Measures for Chicago, Record, pp. 56–59.

[23] See Statement of C. M. Fuller, Sealer of Weights and Measures of Los Angeles County, California, 14 Conf., Weights & Measures, p. 37: "The following suggestions in regard to the enforcement of bread legislation, including tolerances, are offered as a result of five years' successful enforcement of a standard-weight bread law. The law itself provides that the standard weights of all loaves of bread within twelve hours after baking shall be 16 ounces . . . or multiples of the 16 ounce size. A tolerance of one ounce above the standard weight is allowed for each 16 ounce unit. No stated tolerance below the standard weight is allowed, for the reason that were there such a tolerance, certain unscrupulous bakers would not hesitate to scale their bread that amount short. . . . In the enforcement of this act we have convicted 25 bakers, $535 in fines being paid, and several thousand loaves of bread confiscated and turned over to charity. It is interesting to note that the act has worked out so successfully in eliminating the unfair competition of bakers who would cut the price by selling an underweight loaf, that even those firms which were first opposed to the idea of a standard weight bread law are now in favor of it. And I have before me a communication from the Secretary of the Southern California Bakers' Association stating that at a meeting of the Wholesale and Retail Bakers' Association a unanimous resolution was passed indorsing this law." See also Bakers Weekly, Jan. 17, 1920, p. 43.

[24] See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3–6, 20. Also Statement of John M. Mote, Chief Inspector of Weights and Measures of Ohio, 15 Conf., Weights & Measures, pp. 88, 89, 90, 91: "During the period of the war control of the bakers by the United States Food Administration it was clearly demonstrated that it was entirely feasible for bakers to bake loaves to a uniform size, and this is also admitted by the bakers themselves. This indicates that the

Indiana;[25] and the District of Columbia.[26] The value of the prohibition is shown, also, by the fact that, after

proposal to standardize the weight of loaves of bread presents no difficulties of manufacture which may not readily be adjusted. . . .

"Eight months ago the standard-weight bread law became effective in Ohio. We cannot say that this law is perfect in every detail—very few laws are—but we can today realize the great benefits of standardization. . . . On May 1 a questionnaire was mailed to city and county sealers of Ohio, making inquiry as to the attitude of the public and the baking industry relative to the standard-weight provision, and every reply brought the answer of complete satisfaction to both bakers and the general public. We cannot find that the standard of quality has been in any way lowered, due to standardization of weight. With only the two factors of quality and price to be considered, the purchasing public is well able to determine for itself the fairness of the prices charged. With hearty co-operation of 98% of the baking industry, and having the support of the general public, we can safely say this is one of the best statutes enacted in Ohio in recent years." See also 126 Northwestern Miller, pp. 908, 1390.

[25] See I. L. Miller, "Results of the Indiana Model Bakery Law", Bakers Weekly, Jan. 15, 1921, p. 47. The writer says that the law works well and "rarely do we find an instance in which the standard weight requirement is being violated"; that only one case of short weight had to be prosecuted; that the law itself came into existence through the desire of the bakers of the State for a system "of control that would elevate the industry by eliminating certain objectionable trade practices"; that the law has placed the industry on a fair basis; that volume of business no longer depends on shrewd but objectionable trade practices, but upon quality of product; that the size of the loaf does not grow smaller in greater proportion than the price; that the law has been a protection to the consumers and has the approval of at least 98 per cent. of the bakers. See also Bakers Weekly, Feb. 7, 1920, p. 67. The Indiana Bakers Association unanimously adopted a resolution expressing satisfaction with the operation of the standard-weight bread law of Indiana, and offered their assistance and the benefit of their experience to other States attempting to settle the question. See 15 Conf., Weights & Measures, p. 90. See also Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3–6; 12 Conf., Weights & Measures, pp. 32, 33.

[26] See testimony of George M. Roberts, Superintendent of Weights and Measures for the District of Columbia, Hearings on H. R. 4533,

extensive application and trial, it has been endorsed by the national conference on weights and measures and is included in the proposed "Federal Bread Law." Can it be said, in view of these facts, that the legislature of Nebraska had no reason to believe that this provision is calculated to effectuate the purpose of the standard-weight bread legislation?

Third. Does the prohibition of excess weight impose unreasonable burdens upon the business of making and selling bread? In other words, would compliance involve bakers in heavy costs; or necessitate the employment of persons of greater skill than are ordinarily available? Or, would the probability of unintentional transgression be so great as unreasonably to expose those engaged in the business to the danger of criminal prosecution? Facts established by widespread and varied experience of the bakers under laws containing a similar provision, and the extensive investigation and experiments of competent scientists, seem to compel a negative answer to each of

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Feb. 18, 19, 1924, p. 51: "I am firmly of the opinion that the law is very well enforced in the District of Columbia . . . I had totaled up the other day a list of weights that came into my office in one day, for two hundred and some odd loaves, I think it was 250 loaves, and, of course, the weights would vary a little, but I do not believe that there were a dozen of those loaves that were out of the legal tolerance. My recollection is that none of them were out more than one-tenth of an ounce. The average weight was 16.03 ounces. That indicates to my mind how the law is being observed here. The bakers generally, while they are opposed to the law, were very much disturbed when the law was first passed, and made strenuous efforts to have it amended. Congress did not amend it. So far as I know the law has proven very satisfactory. I cannot speak for the bakers, but I do not recall that I have ever had a complaint come into my office from a consumer about the law. They seem to be very well satisfied and the law is very well observed. The bakers have gone along and observed the law very well. We have found it necessary to institute very few prosecutions, and those only for very minor infractions of the law against a few small bakers . . ."

these questions. But we need not go so far. There is certainly reason to believe that the provision does not subject the baker to an appreciable cost;[27] that it does not require a higher degree of skill than is commonly available to bakery concerns;[28] and that it does not expose honest

[27] Standard-weight legislation does away with the necessity for frequent pan changes. See Bakers Weekly, Nov. 29, 1919, p. 37. The prevailing bread prices in Ohio and Indiana are 8¢ for a 16 oz. loaf and 12¢ for a 24 oz. loaf. In New York, the same prices are charged for loaves running two ounces short on the average. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3, 8. Prevailing bread prices in Wisconsin are 7–10¢ for the 16 oz. loaf and 10–15¢ for a 24 oz. loaf; California, 7½–9¢ and 10–13¢; District of Columbia, 9¢ and 13¢; Chicago, 8¢ and 12¢; Texas, 8¢; and Washington, 10¢ and 15¢. But in Iowa, the prices in the larger cities are 9¢ and 12¢ for a 16 oz. and 24 oz. loaf and, in the smaller cities, 8–10¢ for a 14 oz. loaf and 13¢ for a 20 oz. loaf; Idaho, 10¢ and 15¢; Nevada, 10¢ and 15¢; Virginia, 9¢ and 16¢ (18 oz.). See Information received by Director, Bureau of Standards, Dec., 1923–Jan., 1924, on file Mar. 25, 1924.

[28] While there are a large number of uncertain factors connected with the art of breadmaking, reasonable legislation fixing standard weights is practicable. See C. J. Kremer, "Bread Weight Legislation and Retail Bakers," 16 Conf., Weights & Measures, p. —. At the hearings on the "Federal Bread Bill," this was not disputed. See Hearings on H. R. 4533, Mar. 3, 1924. It is generally conceded that the baker can predetermine with great accuracy the weight of a loaf of bread immediately after baking. See 14 Conf., Weights & Measures, p. 77; 15 *ibid*, pp. 80–84. Neither can it be reasonably contended that a 2 oz. tolerance is not enough to cover shrinkage after baking. For, pursuant to a resolution adopted at the Fourteenth Conference on Weights and Measures (p. 87), a series of scientific experiments were conducted. See 15 Conf., Weights & Measures, pp. 80–84. The committee on specifications and tolerances recommended to the conference a tolerance not in excess of the one here allowed. See *ibid*, p. 79. An investigation on the shrinkage of white bread, conducted in the District of Columbia by the Bureau of Standards, showed that the shrinkage, during the first twenty-four hours, from a one-pound loaf, round top, not wrapped, was 4.4%; round top, wrapped, 2.7%; lunch, not wrapped, 5.7%; one-and-one-

bakers to the danger of criminal proceedings.[29] As to these matters, also, the experience gained during the period of Food Administration control, and since then in the several States, is persuasive. For under the Food Administration, and in most of the States, the business was successfully conducted under provisions for tolerances which were far more stringent than that enacted in Nebraska. In the Food Administration regulation, and in most of the statutes, the tolerance was one ounce in the pound.[30] In Nebraska it is two. In some States the weight is taken of the individual loaf.[31] In Nebraska it is the average of at least twenty-five loaves. In some States in which the average weight is taken, it is computed on a less number of loaves than twenty-five.[32] In some, where an average of twenty-five is taken the tolerance is

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half pound loaf, round top, not wrapped, 4.1%; and round top unwrapped, 3.0%. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 62–64. On file at the Bureau of Standards, Mar. 15, 1924, is a record of a large number of experiments conducted in Chicago to the same effect. See also Mass. Dept. Weights and Measures, Bul. No. 4, March, 1915, pp. 7–8.

[29] Bakers have found very little difficulty in complying with the measures where enacted. See Hearings on H. R. 4533, Feb. 18, 19, 1924, p. 31, Mar. 3, 1924; H. E. Barnard, "Bread Legislation from the Standpoint of the Baker," 14 Conf., Weights & Measures, p. 24. The regulations promulgated by the Food Administration had the approval of the bakers. See Report of the Bakery Division, Nov. 1, 1917, to May 31, 1918. Also in Ohio. See 15 Conf., Weights & Measures, pp. 88–91. See also 5 *ibid*, pp. 19–22; 1917 Oregon Dept. Weights & Measures, pp. 7–9.

[30] California, Connecticut, and old Washington Corporation ordinance. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 12–18, 38.

[31] Connecticut, District of Columbia, Indiana, Texas, and old Washington Corporation ordinance.

[32] Chicago (see letter of Wm. F. Cluett to Geo. K. Burgess, Director, Bureau of Standards, Dec. 28, 1923), Connecticut, Massachusetts, Model Bread Law (see 15 Conf., Weights & Measures, p. 79), Washington and Wisconsin.

smaller.[33] Moreover, even if it were true that the varying evaporation made compliance with the law difficult, a sufficiently stable weight can, confessedly, be secured by the use of oil paper wrapping (now required in several States for sanitary reasons[34]), which can be inexpensively supplied.[35] Furthermore, as bakers are left free to charge for their bread such price as they choose, enhanced cost of conducting the business would not deprive them of their property without due process of law. Can it be said, in view of these facts, that the legislature of Nebraska had no reason to believe that the excess weight provision would not unduly burden the business of making and selling bread?

Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved. Compare *Muller* v. *Oregon*, 208 U. S. 412, 419, 420; *Dorchy* v. *Kansas, ante*, 286. The evidence contained in the record in this case is, however, ample to sustain the validity of the statute. There is in the record some evidence in conflict with it. The legislature and the lower courts have, doubtless, considered that. But

[33] Ohio and "Federal Bread Bill." See also Hawaii, Montana, Oregon and Washington.

[34] Wrapping is required by statute or regulation in Louisiana, Maine, Maryland, New Hampshire, Ohio, South Dakota, Vermont and West Virginia. See Hearings, H. R. 4533, Feb. 18, 19, 1924, pp. 11, 16.

[35] See Bakers Weekly, Oct, 16, 1920, p. 61; Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 16, 20, Mar. 3, 1924; "Report of Federal Trade Commission on Bakery Business in United States," Nov. 3, 1917, p. 13.

with this conflicting evidence we have no concern.[36] It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.

To decide, as a fact, that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.

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[36] For arguments in favor of standard-weight loaf law, see Bakers Weekly, Nov. 29, 1919, p. 37; Dec. 20, 1919, pp. 37, 49; Apr. 24, 1920, p. 69; June 26, 1920, p. 49; July 3, 1920, pp. 39, 40; Aug. 7, 1920, p. 55; Jan. 22, 1921, p. 62. For the arguments urged against the legislation, see Northwestern Miller, Vol. 122, pp. 1381, 1401; Vol. 123, p. 406; Vol. 126, p. 398; Bakers Weekly, May 8, 1920, p. 65; May 15, 1920, p. 61. It is interesting to note that none of the writers contend that the tolerance provision is unreasonable. See also Hearings on H. R. 4533, Mar. 3, 1924. There is a great contrariety of opinion among bakers themselves as to the advisability of the legislation and the limits of a reasonable tolerance. "Tolerances of some kind are absolutely necessary, but in view of the conflicting opinion of bakers, weights and measures officials, chemists and others interested in solving the problem, a 'reasonable' tolerance is about as hard to determine as the traditional age of Ann." See 134 Northwestern Miller, p. 1373. Also Bakers Weekly, Jan. 11, 1919, pp. 51, 54; Jan. 18, 1919, pp. 35, 45; Feb. 1, 1919, pp. 46, 50, 55; Mar. 15, 1919, pp. 42, 52; Jan. 17, 1920, p. 43; Mar. 27, 1920, p. 57; May 22, 1920, p. 40; June 12, 1920, p. 57; June 26, 1920, pp. 45, 49; Aug. 7, 1920, p. 39; Jan. 1, 1921, pp. 39–40; Jan. 22, 1921, p. 37.